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IN THE

Supreme Court of the United States

October Term, 1964

No. 893

ARTHUR HOFFMAN,

Petitioner.

AGAINST

CHRYSLER CORPORATION, *et al.*, and PAUL C. ACKERMAN, *et al.*,

Respondents, Defendants below.

AND

SOL A. DANN, *et al.*, and MARY L. GALLO, *et al.*,

Respondents, Plaintiffs below.

AND

ERWIN H. EZZES, HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,

Respondents, Objectors below.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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ARTHUR HOFFMAN, the petitioner herein, hereby petitions this Court pursuant to 28 USC 1257 (3) for a writ of certiorari to the Supreme Court of Delaware so that the determination of that Court approving settlement of certain stockholders' derivative litigation be vacated and set aside.

Jurisdiction

This Court acquires jurisdiction to entertain the instant application pursuant to 28 USC 1257 (3) and in particular the portion of that section which reads as follows:

> "* * * or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties or Statutes of, or commission held or authority exercised under, the United States."

The Federal questions involved in the instant appeal involve abridgement by the Supreme Court of Delaware of the 14th Amendment to the Constitution of the United States in particular the portions reading as follows:

> "* * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * *"
>
> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law. * * *"

The decision of the Supreme Court of Delaware was issued on November 14 1964.

Facts

The instant litigation constitutes the famous stockholders' derivative action brought by various stockholders of Chrysler against mismanagement of the corporation by its officers and Boards of Directors. As a result of the institution of the litigation one Newberg lost his position with Chrysler, one Colbert also lost his position with Chrysler, various suits and proceedings involving issues involved in this litigation were also brought.

At the outset Chrysler engaged in various maneuvers against the plaintiff Dann including attaching his stock and bringing a libel action against him.

Eventually Dann and Chrysler entered into a "settlement of the litigation wherein Dann, for the record, stated that the claims brought could not be enforced and Chrysler, for the record, agreed to modify the Incentive Compensation Plan which granted additional compensation to officers of Chrysler so as to provide for a new formula which purportedly conferred a benefit to the Chrysler stockholders.

As is required in stockholders' litigation the proposed settlement was submitted to the stockholders for approval and further any stockholder was given a right to object and to appear in the settlement proceedings. Certain stockholders, including the petitioner herein, did object to the settlement and the matter was then considered by the Chancellor of the State of Delaware. In the course of this consideration there were hearings held with respect to whether settlement of the litigation would be beneficial to Chrysler stockholders but no real hearings were held with respect to the merits of the claims asserted against Chrysler. This is clearly shown by an inspection of the record involved in this proceeding.

However, at the hearings, certain objecting stockholders did point out that the so-called "new" Incentive Compensation Plan was actually more beneficial to the beneficiaries and less beneficial to Chrysler stockholders than the old plan. Accordingly, before the Chancellor would approve the settlement, he required, as a condition, that during the period of time when the new plan supplanted the old plan all beneficiaries under the old plan could not take any more under the new plan than they took under the old plan.

Thereafter the plaintiff below and respondent Sol. A. Dann petitioned the Chancellor for a re-opening of the proceeding on the merits. Dann stated that the settle-

ment Dann brought about by fraud and deceit, that it was not beneficial to Chrysler stockholders and that the matter should be further investigated. At this point petitioner applied to the Chancellor for leave to intervene as a plaintiff in the stockholders' derivative action, to conduct proper investigation of the charges involved, and thereafter to take such action as the further investigation would warrant. The Chancellor denied this application and approved the settlement.

Appeals were thereafter taken by the objecting stockholders to the Supreme Court of Delaware and, in this Court, petitioner argued the Constitutional questions involved and pointed out that approval of the settlement here would, in effect, approve and countenance a possible fraud in direct contravention of decisions of the Supreme Court of Delaware, the Court of Appeals for the Third Circuit and the Supreme Court of the United States.

The Supreme Court of Delaware thereafter rendered a lenthy opinion but completely ignored the Constitutional questions raised by petitioners.

Petitions for reargument were thereafter made by certain appellants to the Supreme Court of Delaware and these petitions were summarily denied.

Questions Presented Supporting Grant of Certiorari Herein

1. The failure of the State Courts to permit objecting stockholders to try the issues involved herein on the merits constitutes deprivation of stockholders' property without due process of law and therefore is in violation of the 14th Amendment to the Constitution of the United States.

2. The failure of the State Courts to follow determinations of the Supreme Court of the United States requiring full hearing and investigation of any questions of fraud further constitutes deprivation of property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

3. The failure of the State Courts to follow prior decisions of the Supreme Court of the United States in connection with claims of fraud in stockholders' derivative litigation constitutes abridgement of the privileges and immunities of the 14th Amendment to the Constitution of the United States.

Argument

The determinations here of the State Court violate the 14th Amendment to the Constitution of the United States. Before discussing the constitutional issues in detail petitioner requests that the Court take judicial notice of the wide proliferation of "public corporations" in the United States during the past decade and a half. The stock market has now become the trading post of the nation. Six million share days in the New York Stock Exchange are quite common. Almost every individual of any economic level gainfully employed owns one or more shares of stock in various public corporations. Chrysler Corporation, the corporation involved in this litigation, is the third largest automobile manufacturing company in the United States.

Accordingly, with the possibility of the individual stockholder having, in effect, no control over corporate management it becomes extremely important for the Courts to protect the stockholder, particularly in view of Constitutional limitations. Thus, while a corporation is a creature of the State of incorporation, the Federal Constitutional

restrictions under the 14th Amendment prevent a State from sanctioning and abetting wrongdoing.

Let us consider the situation involved in the case at bar. Certain officers of Chrysler admittedly were engaged in conduct not in accordance with proper practice. Chrysler itself, in the instant settlement, did not ask for a release directed to the defendant Newberg and Chrysler itself has claimed that Newberg engaged in practices inimical to the welfare of Chrysler. Colbert, chief executive officer of Chrysler, was removed. A libel action, brought by Chrysler against Dann, has now been conceded to be meritless and Chrysler has agreed to pay Twenty-five Thousand ($25,000.00) Dollars to Dann in connection with Dann's expenses involving the libel action. Dann has submitted papers setting forth that the original agreement by him to settle the stockholders' Suit was fraudulent. Yet, despite all of this, without any hearing on the merits of the charges, the State Court has approved a settlement, has stated that certain charges were meritless, has authorized general releases to be granted to the officers and directors of Chrysler involved herein, and has thereby taken property rights away from Chrysler stockholders without due process of law. Certainly, it is submitted, that this type of State action cannot be permitted by this Court.

This Court has actually gone so far as to say that where a party is not given the right to litigate a claim on the merits in the Courts of the State involved that such action constitutes abridgement of the privileges or immunities of citizens of the United States under the 14th Amendment. This rule was enunciated in *Chambers* v. *Baltimore*, 207 US 142.

The Court has further set forth the general rule that where a party is not given a right, in the Courts of a

State, to assert a claim or defense that such conduct constitutes deprivation of property without due process of law. This principle was enunciated in *Prudential Insurance Company* v. *Cheek*, 259 US 530.

As a matter of fact, in the case at bar, the Court's refusal to even consider the fraud question constitutes conduct in violation of prior determinations not only of this Court but of the Courts below. For example this Court in *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 US 138; *Twin-Lick Oil Co.* v. *Marburry*, 91 US 587; and *Strong* v. *Repide*, 213 US 419, has repeatedly held that if any possibility of fraud exists in connection with settlement of stockholders' derivative actions the matter must be investigated by the Court approving the settlement and failure to so investigate constitutes a violation of Constitutional provisions.

As a matter of fact the decision of the Courts of the State of Delaware have consistently followed the same rule. The Third Circuit Court of Appeals, in *Feldman* v. *Pennroad Corp.*, 155 Fed. (2nd) 773 (775), held as follows:

> "* * * Under the Delaware Law a stockholder is entitled in a derivative Suit to have a proposed settlement of a claim by his corporation set aside if it appears that there is fraud or unfair dealing on the part of the director of the corporation in arriving at the settlement. * * *"

To the same effect is *Perrine* v. *Pennroad Corp.*, 47A (2nd) 479; *Braun* v. *Fleming-Hall Tobacco Co.*, 92A (2nd) 302; and *Karasik* v. *Pacific Eastern Corp.*, 180A, 601.

One of the most interesting expositions of this rule appears in the dissenting opinion of *Masterson* v. *Pergament*, 203 Fed. (2nd) 315 (323), wherein the Court said:

> " * * * The dissent of stockholders from the action of one assuming to represent the Class makes adequate representation impossible. * * * "

And on page 324 of the Opinion the Court held as follows:

> " * * * If manipulations such as these are upheld in the Courts, the stockholders' derivative Suit, which was developed to protect the corporation and its stockholders from breach of trust or fraud on the part of the directors, will cease to be a protective shield. * * * "

Obviously, therefore, the determination of the Supreme Court of Delaware is so at variance with the applicable law, and so violates the Constitutional rights of petitioner that this Court should grant certiorari to rectify the matter.

CONCLUSION

A writ of certiorari to the Supreme Court of Delaware in the instant case should be granted and, upon granting of such certiorari, the determination of the Supreme Court of Delaware should be in all respects vacated and set aside and proceedings remanded to the Chancellor of the State of Delaware for further investigation as requested by petitioner.

Respectfully submitted,

.....
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Decision of the Supreme Court of Delaware

WOLCOTT, J.:

These are appeals from a judgment of approval of the settlement of a stockholders' derivative action brought in behalf of Chrysler Corporation. The settlement approved disposed of two stockholders' derivative actions which had been consolidated for the purpose of settlement. In the two actions 17 separate causes of action, involving in all 70 separate claims, were asserted against 97 individual and corporate defendants.

The causes of action may be divided into three classifications: (1) charges that certain officers of Chrysler had personally profited from transactions between Chrysler and suppliers in which they had a financial interest; (2) charges that some of the defendants as officers and directors had mismanaged Chrysler from 1956 to 1961, and (3) charges that the Incentive Compensation Plan of Chrysler and its Stock Option Plans were not soundly devised, and were unfair to Chrysler's stockholders.

Prior to the agreement of settlement the plaintiffs had conducted fairly extensive discovery proceedings, and agreed to the terms of the settlement only on the condition that they be permitted further discovery in order to determine whether or not the claims asserted in the complaints had sufficient merit to demonstrate the unfairness of the proposed settlement. Additional discovery was allowed which thereafter proved to be elaborate. The final result was that plaintiffs concluded that, except for the

cause of action based upon the unfairness of the Incentive Compensation Plan, no cause of action set forth in the complaints could be successfully prosecuted to recovery because of the lack of probative evidence.

Accordingly, plaintiffs represented to the stockholders in the notice calling a stockholders meeting to approve the proposed settlement that, with the exception of the cause of action based upon the Incentive Compensation Plan, there was no possibility of recovery in any substantial amount for the benefit of Chrysler and its stockholders.

Thereafter, the stockholders, at the special meeting called for the purpose, overwhelmingly approved the proposed settlement and a modification of the Incentive Compensation Plan which was part of the proposed settlement.

In addition, following the stockholders meeting the Chancellor appointed an *amicus curiae* to report to him on the relevant issues to be tendered at the hearing on the proposed settlement, and as to proof which would be of assistance to him in passing on the fairness of the settlement. The *amicus* filed an elaborate report with the Chancellor analyzing the evidence of record and suggesting other areas in which additional proof might be desirable.

Subsequently, an extensive hearing upon the fairness of the proposed settlement was held before the Chancellor. He ultimately approved the settlement. From his judgment of approval these appeals are taken by various objecting stockholders who had appeared at the hearing before the Chancellor to oppose the settlement.

Fundamentally, the settlement agreed upon by the parties and approved by the Chancellor provides that the

actions herein be dismissed with prejudice and releases be delivered to the defendants, with the exception of the defendant Newberg, and, in return, that the Chrysler Incentive Compensation Plan be amended by stockholder action to accomplish what both plaintiffs and defendants say is a better Incentive Compensation Plan than that formerly in effect.

These appeals were taken only by certain stockholder objectors appearing at the hearing upon the settlement. None of the plaintiffs have appealed but appear in this Court as appellees along with the defendants. Only one of the objectors, viz., Ezzes, attacks the approval of the settlement on the ground that some of the causes of action asserted in the complaints are not in fact worthless but, to the contrary, offer hope of substantial recovery for the benefit of Chrysler.

We first consider the arguments made by the appellant Ezzes that certain of the causes of action offer hope of substantial recovery for the benefit of Chrysler. In doing so, however, we consider only those specific causes of action brought to our attention by Ezzes in his brief and at the argument.

First, Ezzes argues that the incentive compensation computations for the years 1955, 1957, 1960 and 1962 were made in violation of the Incentive Compensation Stockholders' Resolution of 1956. The argument is that nonoperating income was improperly included in consolidated net earnings of Chrysler for those years in order to compute the total amount payable as incentive compensation.

For the years in question the payment of incentive compensation was governed by the Stockholders' Resolution of 1956 authorizing the payment of incentive compensa-

tion not to exceed 5% "of the consolidated net earnings for that fiscal year (as reported in the Annual Report to the stockholders)."

In the computations in question all income of Chrysler resulting from its automobile business as well as from its investments, interest on loans, and profits from other sources were included in consolidated net earnings for the purpose of computing incentive compensation. Ezzes argues that the phrase "consolidated net earnings" used in the Resolution of 1956 necessarily excluded earnings from any source not connected with its main business venture, i.e., the making and sale of automobiles. It is argued that the improper inclusion of the so-called nonoperating income for the years in question resulted in an increase in incentive compensation of slightly over $2,000,000 which may readily be recovered from the defendants.

The Resolution of the Stockholders of 1956 does not exclude in terms so-called nonoperating income, but refers generally to "consolidated net earnings." Chrysler is actually a diversified business and has earnings arising from other than the manufacture and sale of automobiles. It has earnings derived from its Air-Temp, Missile, Defense and Space Divisions which are non-automobile sources, and from some other diversified sources such as catering service, vending machines in its plants, etc.

If the stockholders intended to exclude income from sources other than the manufacture and sale of automobiles from the Incentive Compensation Plan, that should have been made specific in the Resolution authorizing such payments. This follows from the provision in the Resolution that incentive compensation was to be based on the Annual Report to stockholders, which included earnings from all sources as consolidated earnings.

Ezzes, however, cites in this connection three cases which he argues control the question.

He cites *Schwartz* v. *Miner*, 37 Del. Ch. 575, 146 A. 2d 801. This case was a derivative action on behalf of a corporation which had a Profit-Sharing Trust Plan providing for contribution by the corporation of a percentage of its consolidated net profits. The corporation made an investment in the stock of a supplying company which it later sold at a loss. In determining later the amount to be distributed under the Profit-Sharing Plan, the loss thus occasioned was not deducted from the net profits. The Chancellor held that the corporation under the Plan was not required to deduct the net loss from the sale of capital assets in determining the amount to be distributed.

The case, however, does not stand for the proposition for which Ezzes cites it. The Plan involved in the *Schwartz* case provided for a contribution by the corporation to the Profit-Sharing Trust of a percentage of "consolidated net profits * * * exclusive of capital gains or losses." We think the Chancellor approved the exclusion of the capital loss from the computation of consolidated net profits of the corporation by reason of the precise exclusion in the Plan, itself, and not upon any theory that consolidated net earnings of necessity must be exclusive of so-called nonoperating income.

Ezzes also cites *Lieberman* v. *Becker*, 155 A. 2d 596. We think, however, this case has nothing to do with the problem. It dealt with an attack upon a Deferred Compensation Unit Plan ultimately upheld by this Court. That Plan, however, was tied directly to the market price and dividends upon the corporation's stock. We see no connection between the rule announced in the *Lieberman* case and the cause of action now under consideration.

Finally, on this point, Ezzes cites *Heller* v. *Boylan*, 29 N. Y. S. 2d 653, aff'd 263 App. Div 815, 32 N. Y. S. 2d 131. This case, we think, is equally inapposite to the one before us. In it the Court construed the term "net profits" used in a bylaw providing for the payment of incentive bonus. The bylaw in question defined "net profits" as the "net earnings made by the company in its business as a manufacturer and seller of tobacco and its products." The Court in *Heller* clearly reached its decision upon the conclusion that if non-tobacco earnings of the company had been intended to be included, the bylaw would have been worded differently.

Thus, it is, we think, that with respect to this particular cause of action the contention of Ezzes that substantial recovery could be made on it is erroneous. To the contrary, we think no recovery could be obtained as a result of trial.

The next cause of action said by Ezzes to have the probability of ultimate substantial recovery is that in 1962 the sum of $884,000, made up of state and local taxes, was included in net earnings. It is argued that this was illegal because this item was not reported in the 1962 Annual Report to stockholders as required by the Resolution governing Incentive Compensation Plans.

The figure $884,000 is arrived at as the difference between $60,700,000 reported as "Taxes on Income" in the 1962 Annual Report to Stockholders, and $61,584,000 included as "Taxes on Income" in the computing of incentive compensation for 1962.

It is therefore argued that since only those amounts reported in the Annual Report to stockholders could be included in the computation of incentive compensation, and since the $884,000 was not reported in the Annual Report,

it was clearly improperly included in the incentive computation and the directors are accordingly liable.

Initially, it is to be observed that the sum of $884,000 included in the 1962 computation is in fact the total of state and local income taxes paid by Chrysler. Prior to 1942 these figures were included by Chrysler's accountants with Federal income taxes but, thereafter, were not so included because the amounts did not again become significant until 1962 after the decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, upholding the right of states to levy income taxes on companies engaged in interstate commerce.

Following this decision, Chrysler's auditors sought the advice of counsel as to whether or not to take such taxes into account in computing incentive compensation. This action was taken in accordance with the 1956 Resolution which authorized the auditors in the computation of incentive compensation to rely upon the opinion of counsel as to any matter of law.

The question therefore as to the propriety of including $884,000 in the computation of incentive compensation for the year 1962 depends solely on whether or not these figures were contained in the Annual Report to stockholders for that year. As a matter of fact, the Annual Report to stockholders of 1962 does in fact contain the figures making up this sum, although they are included under different headings in the Annual Report. We are accordingly of the opinion that the Chancellor was correct in holding as he did that this asserted cause of action had no probability of substantial recovery.

Next, Ezzes argues that the cause of action based upon an alleged violation of the 1929 Incentive Compensation Resolution of Stockholders for the years 1953 and 1955 has substantial probability of recovery.

The 1929 Resolution of Stockholders providing for incentive compensation, later superseded by the 1956 Resolution, provided that incentive compensation may be paid not in excess of 5% "of the net earnings of the corporation for that year." It is argued, citing *Heller* v. *Boylan, supra,* that the clear and unambiguous terms of this Resolution prevented the payment of incentive compensation for the years in question out of "consolidated earnings" of the corporation, but that this in fact was done in 1953 and 1955.

However, from 1929 on, the earnings of the corporation were always reported to stockholders as consolidated earnings. We think this continued practice clearly indicates that the intention of all concerned was that the 1929 Resolution referring to "net earnings" in fact meant "consolidated net earnings." Under the circumstances, it is proper to define the phrase "net earnings" as "consolidated net earnings." *Meyers* v. *Cowdin,* 47 N. Y. S. 2d 471, aff'd 270 App. Div. 827, 60 N. Y. S. 2d 129, aff'd 296 N. Y. 755, 70 N. E. 2d 555, and *Diamond* v. *Davis,* 62 N. Y. S. 2d 181.

We think this cause of action is at best of doubtful merit.

Ezzes next argues that the cause of action charging invalidity of stock options issued after 1956 in violation of the 1956 Incentive Compensation Resolution is meritorious and has promise of substantial recovery against the defendants on behalf of the corporation.

The argument in this respect is that since the Stockholders' Resolution of 1956 limited all Incentive Plans to 5% of consolidated net earnings, necessarily no stock options could have been issued if the full 5% had been paid out as incentive compensation. It is argued that the granting of stock options falls within the meaning of the

words "Incentive Plans" as used in the Stockholders' Resolution of 1956.

Without laboring the issue, however, we are of the opinion that the limitation of a percentage of consolidated net earnings under the Stockholders' Resolution of 1956 has no bearing on the issuance of stock options. This is made clear by a comparison of the Stockholders' Resolution of 1929 with that of 1956. The 1929 Resolution authorized the Board to establish Profit-Sharing Plans and to provide for Bonus Plans. In 1956 the 1929 Resolution was amended to permit the Board to provide plans for officers and executives of the corporation "to share in the profits of the corporation (hereinafter in this Resolution called Incentive Plans)." It seems plain therefore that the 1956 Resolution substituted the phrase "Incentive Plans" for the former phrases of "Profit-Sharing Plans" and "Bonus Plans." This being so, it is apparent that the amendment was not intended to include Stock Option Plans which, ordinarily at least, are not Profit-Sharing or Bonus Plans but are plans designed to permit the optionees an opportunity to acquire a share in the corporation, itself.

Furthermore, the Stock Option Plan of the corporation was approved by the stockholders in 1952 and had at that time no relation to the Incentive Plan of 1929, nor did it acquire any by the subsequent amendment of that Plan in 1956.

Accordingly, we are of the opinion that this cause of action is without merit.

Next, Ezzes argues that the cause of action charging the directors with the wasting of corporate assets by causing the stockholders to cancel stock options previously granted and granting new options at a lower option price

is meritorious and has the probability of substantial recovery.

In 1958 the Stock Option Committee of non-eligible directors granted, subject to stockholder approval, new options to purchase stock at around $50 per share on condition the holders of options previously issued at $61 to $77 per share were surrendered for cancellation. The Board recommended the proposal to the stockholders. It is argued that this action constitutes a waste of corporate assets.

It appears to us that the provisions of the Plan authorizing the issuance of options in 1959 comply with the requirements laid down by Delaware Law for the validity of Stock Option Plans. Indeed, no serious contention is made to the contrary.

The argument of Ezzes under this heading seems to be that a corporation should not permit the cancellation of old options and the issuance of new stock options at lower prices since that, in effect, excuses poor performance by management. Certain magazine and Law Review articles are cited to this effect and, indeed, we may assume that, as an ordinary business practice, such action is undesirable. This does not alter the fact, however, that under the law of this State a Stock Option Plan may not be successfully attacked when the options are granted by a disinterested committee with the approval of the directors and stockholders, and where the optionee is required to remain in the employ of the corporation. *Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57; *Beard* v. *Elster*, 160 A. 2d 731. The new Option Plan meets these tests.

We are of the opinion that this cause of action has no merit.

Finally, Ezzes argues that the cause of action based upon the cost to Chrysler of a revolving credit commitment is meritorious and has probable recovery of in excess of $2,000,000.

The facts underlying this alleged cause of action are that in 1958 Chrysler obtained a revolving credit commitment for $150,000,000 which was continued until 1961. Chrysler never used the revolving credit but its existence cost Chrysler $2,157,533 from 1959 to 1961.

The credit commitment was recommended by the Finance Committee in 1958 of which there were nine members, seven of whom were directors of banks later participating in the credit commitment. Prior to this action Chrysler's Administrative Committee, the members of which were all full-time employees of Chrysler, approved the establishment of the credit commitment. On the same day, the Board of Directors—18 of the total of 21 being present—approved the credit commitment arrangement. Of the 18 directors voting, eight were officers or directors of banks later participating in the revolving credit commitment.

Ezzes argues that the action of the Finance Committee and the Board of Directors was illegal as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and Article II, Section 9 providing that no director shall vote upon a matter in which he is interested.

It appears that the reasons leading to the arrangement of the revolving credit commitment are that in 1958 it was clear to the directors that Chrysler faced heavy cash demands due to the requirements to be caused by major model changes in 1959 and 1961; the entry into the compact car field; increased emphasis on international oper-

ations and a slowdown in Government payments for defense products, all of which would probably require additional cash. In addition, in 1958 it had become obvious that Chrysler's financial fortunes had begun to deteriorate and that its sales were severely contracting.

Accordingly, on the basis of this estimate of Chrysler's prospects the revolving credit arrangement was approved. The agreement was between Chrysler and the Hanover Bank as agent, of which McNeill, one of Chrysler's directors, was president. However, it appears that the Hanover Bank had been selected by two independent officers of Chrysler as agent, and that it had agreed to serve without compensation.

Furthermore, at the time the revolving credit agreement was authorized, no bank other than the Hanover Bank had been selected as a participant in the agreement. As a matter of fact, Simons, Chrysler's treasurer, selected the banks to participate, allocated their shares of the participation, and later reported that fact to the directors.

Thereafter, from 1958 to 1961 the advisability of terminating the credit agreement was reviewed frequently and, in the unanimous opinion of the Board of Directors until 1961, it was continued as advisable for the good interests of Chrysler.

The Chancellor found that the evidence of record discharged the burden of proof lodged upon the directors of proving that the commitment was reasonably necessary as a matter of business judgment for the purpose it was intended to serve, and that, accordingly, the technical by-law violation, if indeed there was one, imposed no liability upon the directors since there was no showing at all of any loss to Chrysler or of any pecuniary benefit to the allegedly interested directors.

We agree with the Chancellor that this cause of action is essentially an attack upon a decision involving the exercise of business judgment on the part of the directors. In the absence of a showing of bad faith or fraud, of which there is none in this record, recovery on this claim is at best of extremely doubtful probability. *Keenan* v. *Eshleman*, 23 Del. Ch. 234, 2 A. 2d 904; *Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 82, 90 A. 2d 660; *Sterling* v. *Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A. 2d 107.

There were other causes of action argued by Ezzes to the Chancellor below, all of which were held by the Chancellor to be of extremely doubtful merit. Ezzes has not in this Court renewed his argument with respect to these other causes of action. We therefore are not required to consider them.

With respect to the causes of action urged upon us as containing probability of substantial recovery and, thus, a reason for disapproval of the settlement, we agree with the appraisal of them made by the Chancellor to the effect that the evidence produced in the record in support of these claims is wholly inadequate to afford any hope of substantial recovery upon them. Therefore, they may properly be described as devoid of merit or, possibly as some of the parties label them, worthless.

Of all of the claims asserted against these defendants, the only one considered to have any possibility of ultimate recovery was the one based upon the alleged unfairness of the 1956 Incentive Compensation Arrangement. All of the parties before us agree that this is the fact with the exception of the appellant Ezzes and the plaintiff-appellee Dann, whose position will be referred to later.

Under the 1956 Plan, incentive compensation awards were permitted to be made for years when the consoli-

dated net earnings of Chrysler and its subsidiaries, computed before the payment of taxes on income and before the payment of incentive compensation and interest on long-term debt of the corporation, exceeded 7% of the shareholder's investment—that is, capital, surplus and retained earnings of Chrysler and its subsidiaries and the long-term debt of Chrysler. The total award for any one year was limited to 5% of such excess. There was no provision limiting the fund to be paid as incentive compensation in any one year to the amount of dividends declared in that year.

The charge of unfairness with respect to the 1956 Plan is that it was wasteful in that it permitted the payment of more in the way of incentive compensation than do comparable Plans of Chrysler's competitors; that the Plan does not limit the payment of incentive compensation only to years when corporate income exceeds a reasonable return on the stockholder's investment, and that the Plan requires a so-called "set-aside" for the benefit of stockholders of only 7% of the stockholders' investment before taxes which, after the payment of taxes, is the equivalent of about 3½%. All of this means, it is argued, that the Plan is unfair because the stockholder's return on his investment is too small in comparison with the incentive compensation permitted to be paid.

The Chancellor concluded that the attack on the Plan as outlined above raised an issue of fairness upon comparison of the return on the stockholder's investment with the amount of incentive compensation that could be paid. He therefore concluded that an issue as to the fairness of the 1956 Plan remained in the case, even though his appraisal of the other causes of action in effect was that they were worthless.

Accordingly, the parties agreed upon a settlement as to the only remaining issue, that of fairness of the Plan. As a part of that settlement they proposed the adoption of a new Incentive Compensation Plan to be submitted to the stockholders for their approval upon the understanding that a vote for its approval was a vote in favor of the agreed-upon settlement. As we have pointed out, the stockholders overwhelmingly approved both the new Compensation Plan and the settlement.

The new Plan of 1963 briefly is as follows: The period within which it is to operate is 1963 through 1969. It provides that incentive compensation may be paid only when the consolidated net income after taxes, as reported in the Annual Report to stockholders, plus provision for incentive compensation plus interest on the long-term debt of the corporation, is greater than 5½% of the stockholder's investment—that is, capital, surplus and retained earnings plus the corporation's long-term debt. The total amount that may be awarded as incentive compensation is limited to the lower of 12% of the excess or the aggregate amount of all dividends paid upon the common stock for the year in question.

The adoption of the new Plan resulted in changing the Incentive Compensation Plan of Chrysler from a before-tax to an after-tax basis. It increased the after-tax set-aside from 3½% under the old Plan to 5½% under the new Plan, thus increasing the benefit to the stockholder's investment. The new Plan increases the percentage rate of incentive compensation computed after the increased set-aside for the benefit of stockholders. The result is that the Plan requires higher earnings before any award of incentive compensation may be made.

Until the earnings for a particular year reach the so-called "cross-over" point—that is, the amount of earn-

ings which would make the fund for incentive compensation the same under both the old and new Plans—the result would be a smaller amount available under the new Plan to be awarded as incentive compensation. After the cross-over point is reached, however, a larger amount would be available for such purposes under the new Plan than would have been under the old. In addition, an increase in earnings in each succeeding year increases the amount of the set-aside so that higher earnings are required in each succeeding year to continue an increase in the amount awarded as incentive compensation.

It is obvious that the settlement with respect to the Compensation Plan has resulted in the increase of the set-aside for the benefit of stockholders before the payment of incentive compensation. This automatically increases the total amount of earnings required before incentive compensation can be paid.

The defendants argue it is really immaterial whether the change in the Compensation Plan is a benefit to Chrysler Corporation. They argue that the settlement should be approved for the reason that the necessity of defending the worthless claims asserted against the defendants would prove an expensive and unreasonable burden upon Chrysler Corporation by reason of the cost of the defense and the wastage of time which would be required of Chrysler's officers and executives. Indeed, this seems to us to be an apparent fact.

The Chancellor concluded that his function was to determine whether or not the terms of the settlement are fair to Chrysler Corporation when set against the probability of recovery on the asserted claims against the other defendants. These are, of course, theoretically asserted for the benefit of Chrysler Corporation.

He concluded that while both the old Plan and the new Plan were probably fair and would be upheld against attack, he could not and should not determine which of the two was the better from the point of view of Chrysler. He pointed out that the new Plan does in fact require higher earnings, up to a certain point at least, in order for the same amount to be paid as incentive compensation as would have been permitted under the old Plan. Recognizing that no one could predict the future of Chrysler accurately, he reached the conclusion that in the long run the new Plan would probably result in increased benefits to the stockholders of Chrysler.

Accordingly, under all the circumstances, he approved the settlement subject to the limitation that no director of Chrysler should receive benefits under the Plan for the year 1963. This limitation was imposed because of the greatly increased earnings of Chrysler for the year 1963 which probably were known or could have been forecast by the Chrysler directors entitled to benefit under the Plan.

It is this determination of the Chancellor we are to review in these appeals. Our function in the review of such matters is not to determine for ourselves the intrinsic fairness of the settlement in the light of our business judgment. Our function is solely to determine whether or not the Chancellor in the approval of the settlement has abused his business judgment to an extent amounting to an abuse of judicial discretion. *Rome* v. *Archer,* 197 A. 2d 49; *Kleinman* v. *Saminsky,* 200 A. 2d 572.

Initially it is obvious that the settlement approved in this litigation does not take the traditional form of the payment of a *quid pro quo* by the defendants. The reason for this is obvious. Such a payment would be nothing more than a buying-off of the plaintiffs for the dismissal

of worthless claims. It is, we think, generally conceded that such a practice is an undesirable one to ask a court to approve. In fact, Rule 23(c) of the Court of Chancery under which this settlement was approved was, we think, specifically designed to end a practice prevalent theretofore to this effect. See 3 *Moore's Federal Practice* (2nd Ed.), ¶23.24[2].

Nevertheless, on the record before us the Chancellor concluded, and we agree with his conclusion, that the causes of action, with one possible exception, were, if not worthless, at least incapable of sufficient proof to hold out much hope of recovery. With respect to the one cause of action about which there could be some argument, the parties have agreed upon, and the Chrysler stockholders have approved, an adjustment which probably will result in a long-term benefit to Chrysler.

Accordingly, we think it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was an harassment of Chrysler, to approve a settlement which departs from the traditional form. Each case, of necessity, must be decided upon its peculiar facts. Under the peculiar facts of this case this settlement is fair and results in the ending of this prolonged and harassing litigation. We think it should be approved.

The appellant Koenigsberg, an objector, argues that the settlement should be disapproved because in effect the stockholders, themselves, are making the payment of settlement through the media of increased incentive compensation payments. We think the argument confuses the facts of the result. Certainly, it is to the benefit of Chrysler stockholders to end this litigation. There is no hope of substantial recovery for their benefit by the continuance of the litigation, but there is assurance of cost

to them in the event it is prolonged. Furthermore, it is at least arguable that the new Incentive Compensation Plan in the long run will benefit the stockholders of Chrysler by reason of the increased requirements of the so-called set-aside.

It seems to us to make little difference under the circumstances of this litigation that the individual defendants who receive releases as a part of this settlement have in fact made no monetary payment in settlement. This, we think, necessarily follows from the fact that the claims asserted against the individual defendants have been found to be devoid of merit. Despite this, they cannot end the litigation. The claims are pleaded with technically legal sufficiency and, thus, are not subject to a motion to dismiss.

Nevertheless, if the claims are prosecuted the expense of defense will fall upon Chrysler Corporation which, in the last analysis, is the Chrysler stockholders. We think, therefore, that while on its face plausible, the argument of Koenigsberg is not sufficient to cause us to interfere with the exercise of the discretion of the Chancellor.

The appellants, Sandler objectors, argue that the settlement should be disapproved because it confers no benefit upon Chrysler and because, for the year 1963, the amount which may be awarded as incentive compensation under the new Plan is some $1,500,000 in excess of that which could have been awarded under the old Plan. The argument is, of course, primarily based upon the fortuitous circumstance that Chrysler's earnings for 1963 were greatly larger than for 1962. While the directors and officers of Chrysler may have realized the potentially greater earnings for that year, that fact has been taken care of by the Chancellor in the condition he imposed

upon his approval of the settlement, that such persons not share in the incentive compensation award for 1963.

A further answer to these objectors' argument is that, in all probability, over the long span of the future, the Plan in its operation will result in benefit to Chrysler's stockholders. Admittedly, no one can predict Chrysler's future earnings but, certainly, in a business such as the automobile industry, profits take their ups and downs and may well equalize themselves over a course of years.

The objector Ezzes makes a final point to the effect that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained.

He points out that of the directors present at the meetings of February 7, 1963 and March 21, 1963, which resulted in the recommendation of the Plan to the stockholders, all but two on February 7, and all but four on March 21, were either recipients of incentive compensation or defendants in these actions, or both. Upon this fact, it is argued that the Board's action in approving the settlement, including the amendment to the Plan, was invalid as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and as a violation of Article II, Section 9 of the bylaws providing that no director shall vote upon a matter in which he is interested, or be present when the vote is taken.

Ezzes overlooks the fact that the action of the directors did not bind Chrysler to the amendment in the Compensation Plan since, under the then-existing Plan, the sole method of change was by stockholder action. The most the directors could do in this respect was to submit to the stockholders the proposed change. This is what was done. Whether or not, therefore, there was some legal defect in the directors' action, that defect could be

cured by informed stockholder action. *Kerbs* v. *California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652.

Ezzes says, however, that there was no effective stockholder action because a fair disclosure of the facts was not made to the stockholders in that they were not informed of the future profit potentials of Chrysler and the resulting possibility of payment of greatly increased incentive compensation under the amended Plan. He charges that before April 16, 1963, the date of the stockholders' meeting, the directors knew that the new Plan would produce a substantially greater fund for incentive compensation for 1963 than would the old Plan; that there had been general public acceptance of Chrysler's 1963 model; that sales and earnings figures pointed to an outstanding year for Chrysler, and that general conditions known to the automobile industry indicated that the industry would have an outstanding year in 1963. The failure to include this information in the proxy material and the notice of settlement hearing, it is asserted, constituted a breach by the directors of their duty to make a full and frank disclosure to stockholders.

It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.

In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan. The Chancellor, however, imposed as a condition upon his approval of the settlement the requirement that no director-defendant shall receive greater

benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection.

All of the plaintiffs, with the exception of the plaintiff Dann, named as appellees in these proceedings, argue for the approval of the settlement. They advance two reasons in support of their position, one of which we have followed for our approval of the settlement. Their second reason is that the main benefit of the litigation now settled was to effect a change in management in Chrysler Corporation which has resulted in its greatly improved financial position.

We are of the opinion that the second reason, if it is entitled to any consideration—a question upon which we refuse to express an opinion—is entitled to consideration only in connection with the application for fees, as to which the Chancellor has reserved decision.

Finally, the plaintiff Dann, an appellee before us, has filed a brief and was permitted to argue orally in opposition to the approval of the settlement.

Some of the other appellees filed a motion to strike the brief of Dann on the ground that he had no standing before us to argue in opposition to the Chancellor's judgment since he had not taken an appeal therefrom. We think the position taken by these appellees is correct and that the plaintiff Dann, appellee here, has no standing to argue in opposition to the judgment below. Cf. *Cleaver* v. *Roberts*, 203 A. 2d 63; *Trans World Airlines, Inc.* v. *State ex rel. Porterie*, 183 A. 2d 174; *Casey* v. *Southern Corp.*, 26 Del. Ch. 447, 29 A. 2d 174. The brief of the appellee, Sol A. Dann, is accordingly ordered struck from the record.

By reason of all of the foregoing, the judgment of the Chancellor approving the settlement of this litigation is hereby affirmed.

Order of the Supreme Court of Delaware Denying Reargument

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

Nos. 39, 40, 41, 42, 47, 48, 49, 50, 51 and 52, 1964

ARTHUR HOFFMAN, ERWIN H. EZZES, HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Appellants,

—vs—

SOL A. DANN, et al., and MARY L. GALLO, et al.,
Plaintiffs Below, Appellees,

—vs—

CHRYSLER CORPORATION, et al., and PAUL C. ACKERMAN, et al.,
Defendants Below, Appellees.

AND NOW, to-wit, this 4th day of December, A. D. 1964, it is

ORDERED:

1. The petitions for reargument of plaintiff Sol A. Dann and the plaintiffs below in Civil Action No. 1330 except Sol A. Dann, and the petition of the appellant Koenigsberg, are hereby denied;

2. The costs outlined in the certificates of the defendants below and the plaintiffs below except Sol A. Dann for printing the appendices, pursuant to Rule 25(3),

are hereby taxed against the appellee Chrysler Corporation.

/s/ DANIEL F. WOLCOTT
J.

/s/ JAMES B. CAREY
J.

/s/ ALBERT J. STIFTEL
J.

Excerpt of Portion of Petition of Respondent Koenigsberg for Reargument

The above quotations from the Court's Opinion do not appear to be either a consideration of or an answer to the argument of improper duress. The following questions are unanswered. Is it the law that the Chancellor has the discretion to approve a settlement obtained by improper duress? Do the facts stated above amount to improper duress as a matter of law? Are the facts stated above true and are they all of the material facts, or are there other facts which give a different color to the transaction?

10. Implicit in the statements on p. 14 of the Main Brief and on pp. 9-10 of the Reply Brief.
11. Footnotes 4, 5, 6, 7, 8 and 9.
12. Ibid., and Reply Brief pp. 16-17.
13. Opinion p. 22.
14. Opinion p. 23.

Koenigsberg raised these issues in his briefs and at argument and took a position with respect to the answers.[15] The issues have not been acknowledged by the Court and in the opinion of Koenigsberg must have been overlooked, since they do not appear to be so ill-conceived

as to merit silence. They were raised in good faith and are substantial.

WHEREFORE reargument for the purpose of considering the issue of improper duress referred to above is requested.

Excerpt From Portion of Petition of Respondents (Except Sol A. Dann) Plaintiffs in Civil Action 1330 Requesting Reargument

1. The Supreme Court Opinion stated (pages 2-3) as follows:

> "Prior to the agreement of settlement the plaintiffs had conducted fairly extensive discovery proceedings, and agreed to the terms of the settlement only on the condition that they be permitted further discovery in order to determine whether or not the claims asserted in the complaints had sufficient merit to demonstrate the unfairness of the proposed settlement. Additional discovery was allowed which thereafter proved to be elaborate. The final result was that plaintiffs concluded that, except for the cause of action based upon the unfairness of the Incentive Compensation Plan, no cause of action set forth in the complaints could be successfully prosecuted to recovery because of the lack of probative evidence."

The fact is that while plaintiffs had conducted some investigation on their own, they had been prevented by Court Order from taking discovery prior to the commencement of settlement negotiations. Limited discovery was agreed to by defendants in connection with the contemplated settlement. Any statements concerning evidence were confined to the state of the record established by the limited discovery and did not undertake to state what might develop in the event that the causes of action should proceed to trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 303

ARTHUR HOFFMAN,
Petitioner,
Against
CHRYSLER CORPORATION, ET AL., and
PAUL C. ACKERMAN, ET AL.,
Respondents, Defendants below,
and
SOL A. DANN, ET AL., and MARY L. GALLO, ET AL.,
Respondents, Plaintiffs below,
and
ERWIN H. EZZES, HERMAN KOENIGSBERG and
VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below.

* * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 893

ARTHUR HOFFMAN, *Petitioner,* *Against* CHRYSLER CORPORATION, *et al.*, and PAUL C. ACKERMAN, *et al.*, *Respondents, Defendants below,* and SOL A. DANN, *et al.*, and MARY L. GALLO, *et al.*, *Respondents, Plaintiffs below,* and ERWIN H. EZZES, HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*, *Respondents, Objectors below.*	No. 893

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

This brief is in opposition only to the Petition filed on behalf of Arthur Hoffman in No. 893 and does not relate to any other petitions which may be filed in this matter.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 205 A. 2d 343 and appears in the Petitioner's Appendix at page 9. The opinions of the Court of Chancery of Delaware approving the settlement of the stockholders' derivative suits below is reported at 198 A. 2d 185 and is printed at pages 61-105 of the Appendix hereto*. Pertinent oral decisions of the Court of Chancery, after approval of the settlement, on applications to stay the proceedings or reopen the hearings appear at RA 48-49 and RA 57-60.

QUESTIONS PRESENTED

1. Since Petitioner did not specially set up or claim in any of the courts below, nor did those courts decide any Constitutional issue now sought to be raised, does this Court have jurisdiction of the case under 28 U. S. C. § 1257(3)?

2. Since the decision of the highest court of Delaware can be wholly sustained on independent grounds of state law, does this Court have jurisdiction under 28 U. S. C. § 1257(3)?

3. Since Petitioner (a) was given notice of the proceeding for approval of the settlement, (b) appeared therein, (c) but did not seek or participate in the prehearing discovery, (d) did not attend the hearings of evidence and

*Further references to numbered pages of appendices will be preceded by the following abbreviations: PA for Petitioner's Appendix; RA for the Appendix annexed hereto; DA for Appendix of Certain Defendants-Below, Appellees filed in the Supreme Court of Delaware. The Dann Appendix in the Supreme Court of Delaware will be referred to as such.

(e) only after the opinion of the Court of Chancery approving the settlement applied to stay the proceedings to permit him to conduct discovery to decide whether or not judgment should be entered on the opinion and since (f) all the issues as to the merits of the claims and the charges of fraud referred to by Petitioner had been argued and considered by the Court of Chancery, is there a substantial federal question which this Court should review under 28 U. S. C. § 1257(3)?

STATEMENT OF CASE

The judgment below approves the settlement of two stockholders' derivative suits brought by various stockholders of Chrysler Corporation, a Delaware corporation. The action entitled *Dann, et al.* v. *Chrysler Corporation, et al.*, Civil Action No. 1330, was commenced on August 12, 1960 in the Court of Chancery of the State of Delaware, and the action entitled *Gallo, et al.* v. *Ackerman, et al.*, Civil Action No. 1585, was commenced on February 26, 1962 in the same court.

In approving the settlement, the Court of Chancery found that it was fair and in the best interests of Chrysler and its stockholders. After reviewing the allegations of conflicts of interest, mismanagement and unfair and excessive compensation, the Court of Chancery concluded (RA 93):

> "Having considered the nature of the claims and possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs."

In affirming the judgment of approval of the settlement, the Supreme Court of Delaware characterized plaintiffs'

claims as "devoid of merit" and said that "it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was a harassment of Chrysler, to approve a settlement . . ." (PA 26).

After plaintiffs' suits were begun, there were various preliminary steps including the intervention of additional stockholders in the Dann action and consolidation of both suits for the purposes of discussing settlement. Counsel for plaintiffs in both actions conducted extensive discovery proceedings prior to entering into the Stipulation of Settlement, dated March 5, 1963. The discovery included numerous depositions and the production of hundreds of documents. After appraising the chances of success in the prosecution of their claims, all of the plaintiffs agreed to a settlement and compromise of their actions with defendants, subject however to court approval (DA 7-8). It was agreed in the Stipulation of Settlement that these two actions, together with other related actions, be dismissed with prejudice and releases be delivered to the defendants therein, with the exception of defendant Newberg; in return the Chrysler Incentive Compensation Plan was to be amended to reflect certain changes deemed to be advantageous to Chrysler's stockholders (DA 31-42).

A notice of hearings for approval of the settlement was sent to all stockholders of Chrysler on March 6, 1963 in accordance with Rules of the Court of Chancery pursuant to an order of that Court. The notice to stockholders notified them of the date for a hearing; invited stockholders to appear, if they desired to object; and informed them of the availability of pre-hearing remedies, which included discovery (RA 15-16; DA 7-30).

Various stockholders appeared to object to the settlement and obtained pre-hearing discovery by way of deposition, interrogatories and the production of a large number of documents. Prior to the hearings of evidence, the court

appointed to examine the record an *Amicus Curiae,* who made a comprehensive report, which was made available to all of the parties.

The hearings of evidence began on May 13, 1963 and lasted for six days. The witnesses testifying (some of them called by the objectors) included the Chairman of the Board, President, Treasurer, two former Presidents and Chairmen of the Board, a member of the Incentive Compensation Committee and other officials of Chrysler, a partner of Touche, Ross, Bailey & Smart, Chrysler's independent auditors, plaintiff, Sol A. Dann, and one of the attorneys who represented the defendants in the settlement negotiations. The issues examined covered all claims as to which any of the objectors sought to inquire, as well as the negotiation of the settlement. After argument and submission of briefs, the settlement was approved by the Court of Chancery with a condition with which there has since been full compliance.

Petitioner, Hoffman, a holder then of 10 shares of Chrysler stock, appeared in the proceedings for approval of settlement by filing on April 15, 1963 a notice of intention to appear, statement of his position and the grounds therefor, in which he alleged information as to the purchase by a named corporation of a 1957 Chrysler Imperial automobile claimed to be a "lemon", suggested that the court look into the quality of vehicles sold by Chrysler, alleged that the plaintiffs' charges were "possibly well founded", stated that the court "should hold full and protracted hearings", and alternatively urged that if the charges were "not justified" or "not well founded", then plaintiffs' attorneys should receive no fees (RA 17-21).

On April 26, 1963, Petitioner made a motion, among other things, to intervene in the two suits and to adjourn the hearing of evidence for six months to give him an opportunity to examine all parties to the litigation (RA 22-23).

On May 1, 1963 at a pre-hearing conference with the Court, Petitioner's New York attorney was admitted *pro hac vice* as requested in his motion and all of the other items of relief sought were withdrawn by Petitioner's counsel (RA 26, 28).

Petitioner neither participated in the discovery conducted by other objectors, nor requested any other discovery of his own. During no part of the extensive hearings of evidence did either Petitioner or any of his counsel appear. Petitioner thereafter submitted only a two page brief in which he asserted that the evidence at the hearings showed mismanagement at Chrysler and objected to the release of the defendants and the payment of their attorneys' fees. Petitioner, however, did not object to the adequacy of the hearings or the sufficiency of the evidence presented (RA 30).

On December 31, 1963 the Court of Chancery rendered its opinion approving the settlement on a condition (RA 61-101). On February 21, 1964 Petitioner again moved to intervene in the two suits, although he regarded himself already as a party, and to stay the proceedings for 90 days to permit him to conduct depositions and other unspecified discovery in order that he might determine whether to oppose entry of judgment on the court's opinion approving the settlement (RA 31).* Petitioner admitted that he had no personal or specific knowledge of the matters in issue and that his motion was based entirely on matters of record (RA 32, 50). Petitioner gave no indication that he desired any information that was not already a part of the record or that he wished to examine any particular witness who had not previously testified at the hearings which he refrained from attending (RA 50-52).

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*Petitioner's motion for intervention was granted to an extent satisfactory to Petitioner's counsel (RA 59-60).

Petitioner's motion for a stay was based solely on charges of fraud made shortly before by Sol A. Dann a plaintiff in one of the actions below, in applications to reopen the hearings. Dann's position at the time seemed to be that his attorneys had not vigorously pursued the "voluminous records of information and potential evidence" alleged to be in his files and that for such reason the settlement was fraudulent (Dann Appendix, p. 8). Petitioner sought the stay for the purpose of examining Dann and his files and the defendants. However, Dann having frequently claimed in the course of the litigation that he had evidence in his files supporting his claims, had been ordered by the court to, and he did, produce all of his files for inspection at the hearings of evidence held ten months earlier in May, 1963 (DA 397-398). At that time Dann objected to certain admissions made by his attorneys as to the lack of merit in his claims. Counsel for various parties, including objectors, inspected the Dann files and counsel for the Gallo plaintiffs represented to the court "that the Dann documents do not comprise evidence" (DA 409). No one, including Dann, contested this statement notwitnstanding as the court said, "the opportunity to inspect was fully afforded" (DA 421). One of the objectors, in his brief below, described the Dann files as "a hodge-podge of informers' notes". Dann was also called to testify by one of the objectors. Under oath, he agreed that he had no evidence, other than the papers produced, that would throw any light on his claims (DA 42). He also agreed that the settlement was in the best interest of Chrysler (DA 412-413).

After the approval of the settlement, Dann, stung by the findings of the court in its opinion of December 31, 1963 of lack of merit in his claims, renewed his earlier assertions as to potential evidence of merit in his claims, attacked his own attorneys and on this basis charged that the settlement was a fraud. Starting on February 7,

1964, when he personally appeared and argued, Dann made various applications to repudiate the settlement, stay the proceedings for sixty days, hold further proceedings and for other relief, each of which was denied after full consideration by the court.

Petitioner made his motion to stay the proceedings for 90 days on February 21, 1964 after the court had already heard and denied Dann's first application to repudiate the settlement. In the meantime, Dann had made further applications to delay or avoid the settlement. After another full hearing and consideration of Dann's further applications, as well as Petitioner's motion, the court denied both of their applications, saying that he had "read carefully all the material which [Dann] sent me, including the communications with counsel. . . . From all that I have seen that has been produced here, and I consider only Mr. Dann because Mr. Bader [Petitioner's counsel] has no knowledge of his own but relies merely on what Mr. Dann is saying . . . it is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted" (DA 457-458). Not only Dann, but Petitioner as well, had had ample opportunity for discovery previously.

Petitioner and other objectors thereafter appealed to the Supreme Court of Delaware. Dann took no appeal. However, prior to the argument of the appeal, Dann submitted an Appendix and a brief, reiterating his charges and seeking to have the case remanded to the Court of Chancery for the taking of further proof. Since under well-recognized Delaware practice one who has not taken an appeal cannot argue in opposition to the judgment below, certain defendants moved to strike Dann's brief. The motion was granted by the Supreme Court of Delaware on the express ground that Dann had no standing to argue in opposition to the

judgment below (PA 30). Although Petitioner submitted briefs on the appeal, he did not appear at the argument.

At no time during any of the proceedings in the Delaware courts did Petitioner purport to raise any questions under the Constitution of the United States or any other federal question. Indeed, an examination of all of Petitioner's papers and statements in the Delaware courts fails to reveal any substantial question of law of any kind.

Petitioner now brings his petition to this Court requesting that the decision of the Supreme Court of Delaware be set aside and proceedings remanded to the Court of Chancery for further investigation.

ARGUMENT

1. Any title, right, privilege or immunity claimed under the Constitution must have been specially set up or claimed in the courts below to give the Supreme Court jurisdiction. 28 U. S. C. § 1257(3). *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942); *New York* v. *Kleinert,* 268 U. S. 646, 650 (1925); *Missouri Pacific Ry. Co.* v. *Taber,* 244 U. S. 200, 201 (1917). It is also essential that there be a final judgment and decree passing upon the constitutional point, rendered "by the highest court of a state in which a decision could be made." 28 U. S. C. § 1257. As was said in the *Memphis Gas* case (315 U. S. 651):

> ". . . Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction . . . ."

Petitioner asserts that he argued constitutional questions before the Supreme Court of Delaware (Pet. p. 4) but no-

where does he indicate the manner in which the federal questions sought to be reviewed were raised. The opinion of the Supreme Court of Delaware (PA 9) makes no reference to any federal question.

Rule 23(f) of this Court requires pertinent quotations of specific portions of the record to be made in Petitioner's statement of his case to show that a federal question was timely and properly raised in the court of first instance and the appellate court. Petitioner has not and cannot comply with this Rule.

Petitioner seems to rely on Dann's applications which themselves involved no federal questions. In addition, Dann himself is in no position to pursue any questions because of his failure to appeal to the Supreme Court of Delaware. Even if Petitioner could press Dann's contentions, it would avail him nothing since Dann, like the Petitioner, raised no federal question in his applications to the court of first instance.

Because no constitutional question has been specially set up or claimed or passed upon by the highest court of Delaware, the Petition for Certiorari should be denied.

2. It is well settled that this Court will decline to review state court judgments which are based on adequate non-federal grounds. *Murdock* v. *City of Memphis*, 87 U. S. (20 Wall.) 590, 634-6 (1875), *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6 (1945). Even if a federal claim is properly raised, as it was not by Petitioner, and the state court declines to consider it and renders its decision solely on non-federal grounds, this Court has declined jurisdiction. *Wood* v. *Chesborough*, 228 U. S. 672, 677 (1913).

The State of Delaware has consistently adhered to the principle that a court, when called upon to approve a settlement and compromise of a pending litigation, is not required to try all the issues involved or to decide them on their

merits. The court is only called upon to consider the nature of the claims, the possible defenses to them and the legal and factual obstacles facing the plaintiff in the event of a trial, and exercise a business judgment in determining whether the proposed compromise is reasonable in the circumstances. *In re Ortiz' Estate*, 26 Del. Ch. 240, 253-54, 27 A. 2d 368, 374 (1942), approved by the Supreme Court of Delaware in *Perrine* v. *Pennroad Corp.*, 29 Del. Ch. 531, 550, 47 A. 2d 479, 488 (1946). The Supreme Court of Delaware rendered its decision below wholly in compliance with applicable Delaware law. *Kleinman* v. *Saminsky*, 200 A. 2d 572, 575 (Del. 1964) cert. denied, 13 L. Ed. 2d 174 (1964) (No. 392); *Rome* v. *Archer*, 197 A. 2d 49 (1964).

With no question here raised as to the adequacy of the grounds of decision, and no doubt that the decision can be wholly sustained on independent grounds of state law, this Court should deny the Petition.

3. Petitioner argues for the first time in his Petition in this Court that his rights and privileges as a Chrysler stockholder under the 14th Amendment were abridged because he was not awarded the right to fully litigate the merits of the claims asserted in the complaints in the Court of Chancery of Delaware. In fact, he was accorded, but did not accept, the right to discover before and explore at the hearings of evidence the merits of these claims. Furthermore, the argument is patently absurd. Such an argument, if sustained, would prevent parties in derivative stockholder litigation from seeking and a court from approving an advantageous settlement thereof, if a single stockholder insisted on a trial on the merits. This is not the law for "it is not necessary for the court to try the issues of the case for the reason that any such requirement would defeat the purpose of settlement itself." *Krinsky* v. *Helfand*,

38 Del. Ch. 553, 156 A.2d 90, 94 (1959). To the same effect, *Braun* v. *Fleming-Hall Tobacco Co.*, 33 Del. Ch. 246, 92 A. 2d 302, 310 (1952); *Rome* v. *Archer*, 197 A. 2d 49, 53 (1964).

4. Petitioner's citation of authorities also sheds no light. The only cases he cites which involve stockholder's derivative actions turn on questions of state law and none of them involve any constitutional question. The only cases in his Petition which involve constitutional questions, *Chambers* v. *Baltimore*, 207 U. S. 142 (1907) and *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530 (1922), are cited by him for the first time in his Petition to this Court and have nothing remotely to do with stockholder s derivative suits, or even fraud.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

FRANCIS S. BENSEL
ROBERT EHRENBARD
350 Park Avenue
New York 22, N. Y.

RICHARD F. CORROON
350 Delaware Trust Building
Wilmington, Delaware

DAVID W. PECK
HOWARD T. MILMAN
48 Wall Street
New York 5, N. Y.

S. SAMUEL ARSHT
DuPont Building
Wilmington, Delaware

MILTON POLLACK
111 Broadway
New York 6, N. Y.

ROBERT H. RICHARDS, JR.
DuPont Building
Wilmington, Delaware

Counsel for respondents, Chrysler Corporation, Ackerman, Brady, Bright, Colbert, Coleman, Dodge, Jacobson, Jones, Laughna, Leary, Love, McCollum, McElroy, McNeil, Misch, Page, Quinn, Row, Townsend, Trippe, Von Bomel, Warren, Woolson, Estate of W. A. Jones, Zeder.

Excerpts From Notice to the Stockholders of Chrysler Corporation

[2-3] This is to inform you of certain developments in the above lawsuits. A Stipulation of Settlement has been signed for the settlement of these lawsuits, which is conditional upon a finding by the Court that the settlement is fair, adequate and reasonable and should be consummated. In accordance with procedure in such situations, the Court has directed that a hearing be held before it passes upon the fairness, adequacy and reasonableness of the settlement.

You are hereby notified that pursuant to an order of the Chancellor of the State of Delaware, dated March 6, 1963, in accordance with Rule 23(c) of the Rules of the Court of Chancery of the State of Delaware, a hearing on the proposed settlement will be held in the Courtroom of the Court of Chancery of the State of Delaware, in and for New Castle County, Eleventh and King Streets, Wilmington, Delaware, at 11:00 o'clock A.M., Eastern Daylight Time, on May 13, 1963. Any stockholder of Chrysler may show cause, if any he has, at the hearing why the settlement of these actions, as provided in the Stipulation of Settlement, dated March 5, 1963, should not be approved by the Court as fair, adequate and reasonable and why these actions should not be dismissed as provided in the Stipulation of Settlement. The hearing may be adjourned from time to time by announcement at the hearing or at any adjournment thereof without further notice.

The plaintiffs in the above actions (sometimes hereinafter called the "Dann action", Civil Action No. 1330, and the "Gallo action", Civil Action No. 1585) are stockholders of Chrysler Corporation (hereinafter called "Chrysler"). The actions were instituted derivatively purportedly in behalf of and for the benefit of Chrysler. The Dann action

was commenced on August 12, 1960. The Gallo action was commenced on February 26, 1962.

* * *

[18] At the hearing on May 13, 1963, any stockholder of Chrysler or party to either of the above actions may present any evidence that may be relevant to the issues to be heard; provided, however, that no such person who is not a party of the Stipulation of Settlement shall be heard and no papers or briefs submitted by any such person shall be received or considered by the Court, except by special permission of the Court, unless, on or before April 22, 1963, notice of intention to appear, a statement of the position to be asserted and the grounds therefor, and copies of such papers and briefs are served:

* * *

[19] and filed with Registry of Chancery, Public Building, Wilmington, Delaware, in which event such stockholder, if he wishes to avail himself of any pre-hearing remedies to which he may be entitled under the Rules of the Court of Chancery, subject to any applicable orders of the Court, must do so prior to the date set for the hearing. The Stipulation of Settlement, the depositions, all exhibits referred to therein, petitions for allowance of counsel fees, and all pleadings and other documents in the actions will be on file on and after March 25, 1963, with the Register in Chancery, Public Building, Eleventh and King Streets, Wilmington, Delaware and available for inspection there by any stockholder of Chrysler, in person or by a duly authorized attorney during regular business hours on each day, other than Saturdays, Sundays and other legal holidays.

* * *

Hoffman's Notice of Intention to Appear, Statement of the Position To Be Asserted, and the Grounds Therefor

[2-8] Arthur Hoffman, of 12 Landau Avenue, Elmont, New York, a holder of ten (10) shares of the common stock of Chrysler Corporation hereby opposes the proposed settlement set forth in the above-entitled action and intends to appear at the hearing on May 13, 1963 at 11 o'clock in order to oppose such settlement.

Pursuant to the Notice by Order of the Court dated March 6, 1963, received by the undersigned as a stockholder of Chrysler Corporation, the following sets forth the position to be asserted in opposition to said settlement at the hearing and the grounds therefor.

In any stockholder's action the interest of the corporation is paramount and no such suit should be prosecuted merely for the personal pecuniary gain of the stockholder prosecuting the same.

The stockholders involved herein have asserted a number of serious charges against the defendant corporation involving financial interest of past and present directors and/or officers of Chrysler Corporation in Chrysler suppliers, personal profits from transactions between Chrysler and suppliers, charges of mismanagement by defendants as directors and officers of Chrysler during the years of 1956 to 1961, and charges relating to the incentive compensation and stock option plans of Chrysler including allegations that they were not soundly devised and provided rewards out of proportion to the performance required to gain the awards.

By the terms of the proposed settlement the defendants admit that the incentive compensation and stock option plans were not soundly devised since they agree, in connection with the settlement, to revise said plans as set forth

on Pages 15 and 16 of the proposal. If, in fact, these plans constituted unlawful diversion of corporate assets to personal profit then, it is submitted, that the defendants should not be given General Releases nor should Chrysler Corporation pay the expenses of these defendants in connection with the litigation.

The other charges made by the plaintiffs are claimed to have been justified and the situation in connection with Chrysler Corporation during the years involved seems to indicate to the undersigned substantial basis for the charges. As a matter of fact the undersigned has received information that in 1957 a firm known as Patents Management Corporation purchased a 1957 Chrysler Imperial which was claimed to be a "lemon". One of the officers of Patents Management Corporation stated to the undersigned that at a hearing on a lawsuit brought by this company against Chrysler Corporation one of the attorneys for Chrysler stated that the litigation involving this automobile had cost Chrysler over Ten Thousand ($10,000.00) Dollars but that they had a policy of refusing to compromise any product claims unless they were absolutely certain that they had no chance of success in a lawsuit.

The undersigned believes that this Court should look into the quality of vehicles sold by Chrysler during the period involved in order to determine whether the alleged financial interest by officers and directors of Chrysler in such Chrysler suppliers caused a deterioration of quality of the supplies purchased by Chrysler relating to vehicles manufactured during the period.

The undersigned does not believe that plaintiffs, after bringing charges which they believe to be well founded, and which clearly indicate can be criticized, can discontinue

an action of this type to the prejudice of the stockholders of Chrysler. A review of these charges indicates to the undersigned that they are possibly well founded and that this Court, together with the regulatory agencies of the United States Government, including the Securities and Exchange Commission, should hold full and protracted discovery and hearings with respect to such charges.

The undersigned has been informed that officers and directors of a corporation owe a fiduciary obligation to the corporation. The charges outlined in the Complaint, at least superficially, do not appear to the undersigned to be "primarily within the area of business judgment". The undersigned is particularly impressed by the portion of the Notice contained on Page 4 reading as follows:

> "* * * Although criticisms might be leveled at some of the transactions questioned, * * *"

Since the defendant corporation is one of the largest public companies in the country it does not appear to the undersigned that it would be in the interest of the stockholders to permit management which has been guilty of shortcomings and errors which appear superficially to constitute breach of fiduciary obligations, to emerge unscathed.

On the other hand if the plaintiffs' charges are not justified, then it does not appear to the undersigned that the plaintiffs and their attorneys should be rewarded at the expense of Chrysler stockholders. Thus, if the charges are not well founded, then the plaintiffs' attorneys should receive no fees whatsoever. If the charges are well founded then the attorneys' fees should be paid by the officers and directors of Chrysler who have been involved in the charges.

Hoffman's Notice of Intention to Appear, Statement of the Position To Be Asserted, and the Grounds Therefor

The Settlement also involves an extremely serious matter which goes far beyond a mere stockholders' suit. The facts set forth in the Notice of Hearing indicate that the charges made by the stockholders have a probative basis. The record seems to show that in an effort to "punish" the plaintiff Dann the defendant Chrysler Corporation brought an action for alleged "libel" and attached Dann's stock. That this suit clearly had no basis is seen by the fact that the defendant Chrysler, as part of the settlement here, is paying the sum of Twenty Thousand ($20,000.00) Dollars to Dann's attorneys and is dismissing said libel action with prejudice. This Court should not countenance actions of this type taken against a petitioning stockholder since, if mismanagement of a corporation is shown, a stockholder should have the right to bring these matters to the Court's attention. To reward officers and directors of a corporation who are parties to a situation of this type and allow them to escape unscathed after bringing a suit having no basis whatsoever, and requiring the stockholders to pay the damages sustained by Dann is, it is submitted, inequitable.

In summary, therefore, the undersigned opposes the settlement arrived at and suggests that justice will be served by bringing this case to trial. If the trial results in a vindication of the corporation's position then the fees of the defendants will, of course, be paid. If the trial results in a vindication of the plaintiffs' Complaint then, it is submitted, that the officers and directors of Chrysler involved in the mismanagement alleged, should be seriously dealt with. Not only should their attorneys' fees not be paid but they should be personally held liable for any damages that have resulted by reason of such mismanagement.

Furthermore it appears that this Court should look into the possible deterioration of the quality of vehicles manu-

factured by Chrysler during the period when the questioned relationships between the officers and directors of the defendant Chrysler Corporation and its suppliers were involved.

s/ ARTHUR HOFFMAN
Arthur Hoffman

(Verified April 11, 1963.)

Hoffman's Motion for Intervention, Adjournment and Other Relief

[1-2] THE OBJECTANT, ARTHUR HOFFMAN, of 12 Landau Avenue, Elmont, New York, hereby moves this Court for the entry of an Order providing as follows:

1. That the Objectant be granted leave by this Court to intervene in the Instant Actions and to be made parties thereto, the captions of these actions to read respectively SOL A. DANN, et al., Plaintiffs, v. CHRYSLER CORPORATION, et al., Defendants, and ARTHUR HOFFMAN, et al., Objectants, MARY L. GALLO, et al., Plaintiffs, v. PAUL C. ACKERMAN, et al., Defendants, and ARTHUR HOFFMAN, et al., Objectants.

2. That Objectant's personal attorney, I. WALTON BADER, a member of the Bar of the Supreme Court of the United States, the State of New York, and the District of Columbia, be permitted to appear for Objectant *pro haec vice* in this action.

3. That the hearing set for May 13th, 1963 be adjourned for a period of six (6) months to give Objectant and others who may be interested an opportunity to examine all parties to this litigation to determine the facts involved.

4. That this Court petition the Securities & Exchange Commission, pursuant to an authority contained in the Securities Act, to conduct its own investigation of all of the facts and circumstances surrounding this litigation and report to the Court as to the facts found.

5. That this Court direct the Corporate Defendant and the individual Defendants to set forth the amount of legal

fees charged, paid, billed and prospectively incurred in connection with this litigation and that such fees be brought to the attention of all the stockholders of the Corporate Defendant prior to termination of this action.

6. That this Court grant Objectant such other, further and different relief as this Court may deem just and proper.

.....

Arthur Hoffman, Objectant
12 Landau Avenue
Elmont, New York

Moving Affidavit

[1-3] ARTHUR HOFFMAN, being duly sworn, deposes and says:

I am one of the Objectants herein.

This application, for multiple relief, is made to this Court in connection with the above actions.

The first inkling that I had of any proposed settlement in this litigation came through a notice sent to all of the stockholders of Chrysler wherein the proposed settlement was set forth.

I, therefore, conferred with my attorney, I. Walton Bader, in New York City, and filed Notice Of Intention to Appear in accordance with the Notice previously sent me.

As now appears from the Motion made by the Defendants Chrysler and its officers a considerable amount of legal work is now contemplated.

Since my finances do not permit my employing an attorney admitted to the Courts of Delaware the undersigned seeks leave of this Court to permit his personal attorney, I. Walton Bader, of 50 Church Street, New York 7, New York, a member of the Bar of the Supreme Court of the United States, the State of New York, and the District of Columbia, to appear *pro haec vice* in this litigation.

A review of the Motion made by the Moving Defendants indicates that these Defendants have not informed the Court as to the amount of their legal fees with which they intend to saddle the stockholders of Chrysler. The Moving papers further indicate that the Plaintiff Dann is attempting to obtain an extremely large allowance for his services and expenses from this Court, also at the expense of the stockholders of Chrysler.

In order to protect the interest of Chrysler stockholders, who apparently are not properly represented by either side

in this litigation, the undersigned requests leave to intervene as a party in the litigation in order to insure that no untoward advantage is being taken of Chrysler stockholders.

The undersigned further believes that a proper investigation of the facts in these actions would take at least six (6) months and therefore suggests that this Court adjourn the settlement here for this period of time in order to give the Objectants the opportunity to examine all parties to the litigation and determine the facts.

The undersigned further suggests that the Securities & Exchange Commission be requested by this Court to conduct a full investigation of the management of Chrysler during the period of time set forth in this litigation in order to determine whether the Instant Actions should be continued or settled and, if settled, under what terms and conditions.

WHEREFORE Objectant prays that the Instant Motion be in all respects granted.

.....

Arthur Hoffman, Objectant

Sworn to and subscribed before
me this 26 day of April, 1963.

/s/ I. BAIRD GREENBERG
Notary Public

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

MORNING SESSION

[30-31] Mr. Bader: May it please the court, my name is Walton Bader. I represent Mr. Hoffman. I am a New York attorney, and have no standing before this court unless your Honor will permit me to appear *pro hac vice.*

The Court: Your client's papers were served and filed. Does anyone object to Mr. Bader appearing under those circumstances, since his client pleads poverty and inability to obtain Delaware counsel, as I understand it?

Mr. Bader: That's correct, your Honor.

The Court: Hearing no objection, we will extend the courtesy and permit you to appear *pro hac vice.*

Mr. Bader: Thank you, your Honor.

* * *

AFTERNOON SESSION

[41] Mr. Corroon: Your Honor, the defendants' counsel have consulted with the objectants' counsel and we have come to some degree of agreement on this list of matters that I have presented, so I will run through them.

* * *

[44] Items 25, 26, 27 and 28 have been withdrawn.

* * *

[113-115] DANN v. CHRYSLER

Matters which May Arise
At Conference on May 1, 1963

1. Motion to separate issues (Corroon).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

2. Appointment of general counsel for objectants (Corroon).

3. Consolidation of objections for purpose of depositions and discovery (Corroon).

4. Hastings agenda.

5. Gallo agenda.

6. Marking sessions for documents (Corroon).

7. Order and length of opening statements at hearing (Corroon).

8. Motion that Love and Townsend be directed to appear at the hearing (Hastings).

9. Production of documents by Chrysler at the hearing (Hastings).

10. Production of minutes by Chrysler at the hearing (Hastings).

11. Names and addresses of all witnesses and experts whom defendants intend to have testify at the hearing, etc. (Hastings).

12. Motion that all discovery, including discovery relating to fees, be completed before May 13 (Hastings).

13. Motion that Dann file affidavit or produce documents (Gallo).

14. Motion re Dann deposition (Gallo).

15. Motion that Mortis' objections be made more specific (Gallo).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

16. Proposal of Koenigsberg to appoint general counsel for proponents of settlement (Miller).

17. Proposal that statements of issues and lists of witnesses be furnished (Miller).

18. Interrogatories addressed to Chrysler (Miller).

19. Request that Chrysler produce documents at the hearing (Miller).

20. Request for admissions (Miller).

21. Motion for rulings on Dabney deposition (Miller).

22. Notice of resumption of Dabney deposition (Miller).

23. Notice that Dann appear at the hearing with records (Miller).

24. Notice for Colbert, Minor, Keller, Rowe, Quinn, Laughna, Love and Townsend to attend hearing (Miller).

25. Intervention by Hoffman (Hoffman).

26. Adjournment for six months (Hoffman).

27. Amounts of defendants' attorneys' fees (Hoffman).

28. Referral to SEC (Hoffman).

29. Motion to quash notice to attend hearing (Minor).

30. Notice of depositions of Misch, Graham, McElroy, Simons and Boyd (Morris).

31. Motion to produce documents (Morris).

32. Notice of depositions of Colbert, Warren, Keller, Misch, Love, McNeill (Handleman).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

33. Notice of depositions of Kuller, Tousche, Ross (Handleman).

34. Motion to produce (Handleman).

35. Proof or concession that objectants are stockholders of Chrysler.

* * *

Brief of Objector Arthur Hoffman

[1-2] The objector Hoffman, at this time, will merely make certain observations based upon the evidence adduced at the hearing upon the objections.

Firstly, it is respectfully pointed out that the amount of legal fees to be paid to the attorneys representing the individual defendants, which amount was revealed at the hearing, are totally excessive in view of the fact that Chrysler's attorneys were carrying most of the defense of this litigation. Further, the evidence at the hearing clearly showed that there was a substantial basis for the plaintiffs' claims of mismanagement at Chrysler. Therefore, to saddle the stockholders of Chrysler with attorneys' fees for services rendered for the benefit of officers and directors who condoned mismanagement would appear to be unconscionable.

In addition to the above the evidence at the hearing clearly showed actionable mismanagement on the part of Chrysler and to permit the officers and directors of this firm to get off scot free would appear to be unwarranted.

The undersigned requests the indulgence of the Court with respect to the law involved which will be set forth in detail at the time that Reply Briefs are due.

Dated: June 26, 1963

Respectfully submitted,

ARTHUR HOFFMAN, Objector
12 Landau Avenue
Elmont, New York

Hoffman's Motion to Stay Proceedings, to Take Depositions, and for Intervention

[1-2] Arthur Hoffman, an objectant herein, hereby moves for a stay of proceedings for ninety (90) days in connection with the proposed settlement of the above-entitled actions and pursuant to Rules 26 and 34 to take the depositions of Sol A. Dann, Chrysler Corporation by its appropriate officer, NAFI Corporation by its appropriate officer, the corporate defendants named in the Complaints herein by their appropriate officers, and the individual defendants named in the Complaints herein, and to direct the parties, whose depositions are to be taken, to produce all relevant books, records, documents and tangible things relating to the issues involved herein and to permit the said objectant Arthur Hoffman to intervene in the above-entitled actions as a party plaintiff.

The grounds supporting the relief requested are set forth in the accompanying affidavit of Arthur Hoffman which is made a part of this Motion.

Dated: February 21, 1964

Yours, etc.

SOTIERE S. KAPSALIS
Attorney for Objector
Arthur Hoffman
1001 Bank of Delaware Building
Wilmington, Delaware

. . . . . .

I. WALTON BADER
Attorney for Objector
Arthur Hoffman
170 Broadway
New York, New York 10038

Affidavit of Arthur Hoffman in Support of Multiple Motion

[1-4] ARTHUR HOFFMAN, being duly sworn, deposes and says:

I am a present stockholder in Chrysler Corporation and own twenty (20) shares of the common stock of that company. I am a stockholder of record on the books of said corporation and reside at 12 Landau Avenue, Elmont, New York.

This affidavit is submitted in support of the multiple Motion to permit me to take the depositions of the plaintiff Dann and the defendants in the above-entitled actions pursuant to Rule 26 and to require said plaintiff and defendants to produce all relevant and material books. records, documents and tangible things.

The Motion further seeks a stay of all proceedings in connection with the proposed settlement of the above-entitled stockholders' suits and to permit me to intervene therein as a party plaintiff.

In my opinion the charges made by Dann and Gallo, if in fact sustained, constitute a national disgrace particularly in view of the fact that Chrysler Corporation is one of the largest business entities in the United States.

I must confess to the Court that my specific knowledge of the charges involved has been derived from a reading of the Dann and Gallo Complaints and from the proceedings in connection with the proposed settlement. I have no personal knowledge of the matters involved nor have I taken any depositions in connection therewith.

My attorneys have advised me that the proceedings heretofore had indicated that the charges made by Dann and Gallo have some basis but that the present record is insufficient to warrant any conclusive determination.

My attorneys have further advised me that the Court's opinion approving the settlement of the stockholders' litigation involved herein was made on the basis of the record adduced before this Court.

My attorneys have received a telegram from the plaintiff Dann as well as a large number of documents which indicate both to my attorneys and to myself the very serious possibility of fraud in connection with the settlement of the above litigation.

The charges made by Dann are of a very serious nature and, if proven, would warrant, in both my attorneys' opinion and my own, the imposition of the most severe sanctions that this Court could make.

Obviously I cannot, merely on the basis of assertions made by Dann, state categorically that fraud has been involved in the making of the instant settlement. However I would be in a position to do so if I had an opportunity to examine all of the parties concerning all of the relevant facts and circumstances involved in the making of the settlement involved herein.

There appears to be enough in the papers to indicate substantial grounds for believing that fraud has been involved. Therefore I believe that the interests of the stockholders and of justice would be served by permitting me to have the opportunity of taking depositions of all of the parties involved and of requiring these parties to produce all relevant and material documents involving the issues of this litigation.

I realize that this proceeding has been protracted for a considerable period and therefore am willing to agree that, subject to the cooperation of the parties to be examined, that the depositions can be concluded within ninety

Affidavit of Arthur Hoffman in Support of Multiple Motion

(90) days. At the conclusion of this period I would be in a position to make an alternative application to the Court for leave to continue this litigation to trial and judgment, for leave to request the imposition of additional conditions in connection with any settlement of the aforesaid litigation, or for leave to permit the settlement to go forward on the present basis.

The undersigned regrets that the shortness of time involved in connection with this application prevents the filing of an appropriate Memorandum of Law but I have been advised by my attorneys that wherever there is the slightest possibility of fraud in connection with stockholders suits the Court must suspend all proceedings until a full and thorough investigation of any allegations of fraud is concluded.

I should be most happy to cooperate with the Amicus Curia appointed by this Court in order to fully and thoroughly investigate the serious charges that have now been made.

I believe that I probably am a party to the above-entitled litigation by reason of my filing of objections to the settlement thereof. However, in order to remove all doubts, I request that this Court formally grant me the right to intervene as a party and to amend the captions of the actions accordingly.

.....

Arthur Hoffman

Sworn to before me this 21st
day of February, 1964.

.....

Notary Public

Excerpts from Transcript of Hearing of February 7, 1964

[3-12] Mr. Dann: May I be heard, your Honor.

The Court: Yes, but I assume it will not be to argue the merits because we will take that up a little later.

Mr. Dann: May it please his Honor, the Court, I would like to state my position concerning any of the proposed orders that have been submitted or may be submitted to you.

Since the publication of the stockholders' notice, but more especially since this Court's opinion, both I and my family have been terribly hurt at the way these have been interpreted in the press and by the public generally. In fact, your opinion was misinterpreted to mean that there was no basis for bringing this action, when in fact your Honor's opinion did not say so. This Court was careful to say it was only weighing the probability of success in meeting the burden of proof by legal, competent evidence according to what evidence was in the record at the time you rendered your opinion. This Court never attacked my good faith or the good faith of plaintiffs in bringing this suit, and the Court specifically rejected objectors' contention that the action should be dismissed because the objectors claimed that we did not state a cause of action.

Yet the misinterpretation of the stockholders' notice, and the warping of this Court's opinion in the press, by publicity which may have emanated from interested sources, has seriously embarrassed me and affected me no end. Persons who came to me previously with information about the misconduct of the various defendants have asked me how much did I get for selling out; how much was I paid off for giving the defendants a whitewash, and other vicious ennuendos and statements impugning my reputation and that of my associates.

This I have had to endure despite the years of work I and my office have put on this case. The embarrassment, and the pressures and inconvenience that I and my family have been subjected to, I resent, and am hurt by such personal attacks upon my integrity.

I resent the unfair warping and slanting of your Honor's opinion. I did not ask you or anyone for praise for what I did, and I respectfully submit that I don't deserve to be discredited and be made a scapegoat, directly or indirectly, and primarily indirectly because your Honor, I am sure did not intend to.

I need this Court's help in order to answer these vicious attacks against me and to make sure that I will have the opportunity to present my position and present to your Honor all of the facts concerning this case before any order is approved.

Therefore, I am offering into the record and handing to the stenographer, copies of the letters I sent to my co-counsel, dated January 24, 1964 and February 3, 1964, from whom I have had to disengage myself. I am asking the Court to consider these statements, and the statements made in these letters, and the exhibits referred to and attached thereto, and my further statement to the Court at this time, as though read into the record.

I further want to give the Court a copy of an alleged telephone conversation that my office received from the office of Hastings, Taylor and Willard, that Senator Hastings is alleged to have had with Judge Peck concerning the things that I had to do and must do in order to get this settlement approved by the Court.

I also want to hand to the stenographer a copy of an affidavit given to me by Mr. Horvath, concerning the promises made to him of $50,000 by my co-counsel if he would

discharge me and give them power of attorney. After having returned to Detroit, and after having executed that power of attorney, he revoked that power of attorney, as this document shows.

I also want to have the Court have the benefit——

Mr. Dabney: May I register my objection to these materials being received before being heard and before your Honor rules. There are only partial statements, and if we get into this of course we will get fuller statements.

The Court: I am considering this as nothing more than a statement. This is not a trial this morning. This is merely being recorded as statements that are made and is not evidence being taken.

Mr. Dann: I would like to have your Honor have the benefit of letters of my former co-counsel assuring me that they had not made the statements contained in the stockholders' notice, but that the confusion which arose would be cleared up before the Court when they presented their petition for fees.

I would like to have your Honor see the letter that I sent to my co-counsel insisting that all of these matters concerning this case be brought to your Honor's attention in fairness to this Court in order to correct, as I say in my letter to them of March 15, any false impressions that may have been conveyed to the Court, as well as others, by reason of the erroneous statements in the stipulation, the notice to the stockholders, and press releases.

There is correspondence over the signature of some of my co-counsel saying that the full position will be presented later. There are any number of letters in this file in which I say to them that in fairness to the Court this should be done promptly, that your Honor should be fully advised,

and if these depositions were phony depositions, as I contend in some cases they were, with prearranged questions not to go into the matters and scope of matters, then that should be brought to your Honor's attention instead of, as I think your Honor may have been misled into thinking that they were gone into at great length and depth, especially that of Mr. K. T. Keller and members of his family.

As far as I know, aside from statements in the stockholders' notice, our co-counsel never concluded that there was no merit to the cause of action. I repeatedly asked them to follow your Honor's interpretation of what a deposition should contain and what a deposition should do, as set forth in your Honor's letter, if my memory serves me correctly—I'll get the letter—that a deposition should be able to discover evidence or lead to evidence.

It was this tremendous amount of leads to evidence that my files contain that practically none of those deposed were ever asked about. Certainly the Gallos' counsel never asked questions about them although they were requested to come to Detroit and offered the opportunity to do it. The first time they examined them was when these were brought down to Court, and examined them at the hotel for two days, just turning the pages over and making some notations.

I would like to have your Honor know that Mr. Dabney in a memorandum that he sent to Karl Horvath in 1962 at that time said does the new management seriously intend at this late date to deny that there was dishonesty in the old management? How about Keller, Colbert, Newburg, Minor, Laughna, to mention only a few.

When Mr. Dabney came to Detroit and examined some of the information in the file, he wrote a letter to the Hastings firm setting forth that I've looked over the file ma-

terial and we will have no difficulty in making a respectable showing. I requested repeatedly to bring to your Honor's attention the position that Mr. Rosenbaum and I repeatedly took, that it would be unfair to this corporation and its stockholders if Newburg alone was made the scapegoat for what had occured here, that if all these defendants were released without contribution it wouldn't be fair to the stockholders.

But then we had to take into consideration the statement made to me by Mr. Love, "Mr. Dann, if we can disprove all of your charges, the airing of all this in public, there won't be a Chrysler Corporation in five years, and on the other hand, if you prove all of your charges you will have a bankrupt corporation on your hands."

This presented a serious problem, how to deal with it and deal with it honestly and honorably. I at that time said if it can be done with the Court being fully advised of all of the information concerning these men and their wrongdoings, I am willing to go along with it, but I don't want to be a party to any fraud on the Court, I don't want to be a party to any deception, and I think if the Court knew of how serious the situation was, the Court would understand why I too would go along with a situation like this, and the stockholders would understand.

Many attempts were made to pressure me into making a statement that there was no information which would lead to evidence. And as my correspondence says, I would never do that over my dead body, because I realized to some extent the possible consequences not only to the public but to this very corporation because if these defendants can all go scot free with one scapegoat, it would only invite those who have been wrongdoers to continue doing these wrongs.

The whole purpose of this litigation and the effort that has been put into it would have been of naught.

It would present a horrible example, in my opinion, for other stockholders' litigation. It would invite instead of deterring those who start strike suits. It would even deter those who have a legitimate claim from coming into court, and this is what I am afraid of.

If after all I have done I could be made the scapegoat, unintentionally I am sure on your Honor's part, then what should somebody else say who has put in lesser time and lesser effort in the situation?

I have in the past, and I still want to believe, that those who say it is wrong to seek justice in court should think twice. I as a lawyer could not go along with that kind of a feeling on the part of certain elements of the public.

For the many reasons as I pointed out in these letters that I want to give to the Court and have read into the record, I urge your Honor at this time to give me an opportunity to engage other counsel in behalf not only of myself but of the other stockholders.

I have been in contact with a nationally known figure and attorney. I am sure your Honor knows him, and he speaks highly of you, as I myself feel. It was he that encouraged me to come here and make this presentation to you. He said, "The court, I know, is an honorable man, and instead of being afraid, as your counsel has made you feel, of coming before this Court and telling these things, on the contrary I think you owe it to the Court: I think the Court is entitled to it."

So I would like to complete my arrangements, and I am pleading now for an opportunity to fully present and explain my position before your Honor considers an order, or signs any order, that will tie the Court's hands from doing

that which it may not want to do after it hears and contemplates some of the things that might go into the claims of their petition for fees, or the things outlined in the affidavit in support of it, which are inconsistent, according to statement of Judge Peck to Mr. Hastings in his memorandum—this is supposed to be a copy of his conversation—and the statements made in the stockholders' notice.

I am not in an enviable position before the Court, I realize that, but I feel I had to do this out of respect for this Court.

The Court: May I ask you one question. Do you impugn your testimony given at the settlement hearing in any way?

Mr. Dann: I don't impugn it but it may need explanation in view of the interpretation that your Honor may have placed upon it.

The Court: You don't mean explicitly, because I don't believe it is referred to explicitly in the opinion, isn't that so?

Mr. Dann: I don't recall whether it is referred to explicitly except in the Wall Street release on what your Honor held. They said Mr. Dann and his counsel came to the conclusion, presumably telling the public that these were included in your Honor's opinion, but I couldn't find it.

The Court: Is there anything else you care to say, Mr. Dann?

Mr. Dann: As I say, I would like to have the opportunity to explain all of these more fully to the Court.

The Court: You may hand the reporter copies of the documents you have in mind. I will determine whether or not, in fairness to the other parties involved, they should be spread upon the record.

Mr. Dann:

* * *

Excerpts from Transcript of Hearing of February 7, 1964

[14-25] There are many additional items in my file in Detroit. I only happened to bring along those items which I took to New York in order to confer with other counsel, and that is why I would like the opportunity to complete the presentation before the court, because after a case involving as much as this does—not necessarily in money but as an example to the public of what lawyers and courts stand for and what they will not stand for—it should, in fact it must, in my opinion, not terminate with conflicts of interest, possible conflicts of interest, on the part of any of the attorneys involved.

But there is something wrong here, something wrong here, and I think and believe, as this man does who urged me to come and tell you, that your Honor would get to the bottom of this. I believe, as he indicated, that this court will not stand for being used, any more than I want to be, used, to give anyone who may be guilty of wrongdoing a whitewash at the expense of my reputation.

I realize the seriousness of this; I am sure the court does. But what to do, how to proceed now, raises some serious questions, serious problems. I need the court's help.

The Court: Thank you. Mr. Dann.

Does anyone else care to be heard?

Mr. Rosenbaum: Under the circumstances, your Honor, if I may, I think I should like to address myself to the court at this time.

As a member of the same law firm of which Mr. Dann is a partner, I think I owe it to the court at this time to say that I do not quarrel with some of the statements as they pertain to specific facts, but as to the interpretation thereof, I differ with him greatly.

If his statement is intended to cast any aspersions on co-counsel, I, on behalf of all the other partners of my firm

except Mr. Dann, categorically deny the same, and let the facts speak for themselves. I think it was Bacon, in one of the very famous essays, who started out his essay on truth with the question "What is truth? said the jesting Pilate; would not stay for an answer".

I am very sympathetic with Mr. Dann, having lived with this case now for several years, and having also been a member of the same firm, working morning, noon and night, and sometimes on Sundays. I can see how he has been deeply hurt by the misconstruction that has been placed on his activities throughout these proceedings and prior thereto, and especially through press releases, for which the court, of course, has no responsibility.

I think at this particular juncture I should say that the interpretation on facts as to what is truth, what is evidence, what is information, are areas that not only involve semantics but the exercise of judgment in a legal sense in the highest sense of the term.

In that regard, I should like to say to your Honor that I think that Mr. Dann's testimony is not impugned by anything he said here today. I am now alluding to the testimony which he gave during these hearings. He sat through a goodly part of these hearings just as I sat through a goodly part of these hearings. Insofar as the emphasis which may be placed on the exercise of judgment in eliciting facts on depositions, there is always a very troublesome area. Many lawyers take the position that without knowing precisely what the answer is going to be, the questions, perhaps, are better not put. That, of course, applies primarily on trial of the issues *per se*. On depositions for discovery, again, there is that realm of personal opinion, and the judgment of the lawyer who is exercising that opinion.

I, for one, had nothing to do with the taking of any of the depositions that were taken by our co-counsel. However, I have no reason to think that they did not exercise good judgment and good faith throughout.

I think Mr. Dann is primarily concerned about whether or not the charges which have been made about him and to him can be adequately disproved. He feels, apparently, helpless at the moment.

I met with co-counsel for plaintiffs this morning. That is, co-counsel for plaintiffs Dann and Horvath. I still speak for Karl Horvath. At this particular juncture, Mr. Dann, although as a member of our firm, is also a party litigant, and I think on that score, as I have frequently told him and told our co-counsel, I think he has the prerogative of speaking for himself whereve: there is a variance of judgment or opinion. Suffice it to say at this particular moment I think that this court can render full and complete justice, as I read the court's opinion at this particular time, by making adequate provision for the development and elaboration of the information which Mr. Dann deems to be so highly important in order to fully apprise the Chancellor. I met this morning with Messrs. Dabney, Willard, and Clarence Taylor with reference to what I deem to be an order which would not only protect the integrity of the court and of the plaintiffs and give ample opportunity to Mr. Dann to be able to answer those who have accused him of having sold out, or having gotten money under the table. I think that at this particular point my statement should convey exactly the feeling of my firm, the firm that goes under the title of Dann, Rosenbaum, Bloom and Kaufman, other than Mr. Sol Dann, who has spoken for himself to your Honor. I believe that as your Honor will review the entire record, you will find that on many occasions it is

completely true, as Mr. Dann has alleged, that I have differed vastly with our co-counsel. However, in any type of organization where there is collaboration from the standpoint of working in concert, it is necessary to have a *modus operandi*. We had agreed at the outset that the majority of the firm's opinions would govern, and based on that rule, and abiding by that criteria, I frequently yielded in areas where I thought that better judgment dictated steps otherwise.

However, I think it is highly important to point out that in no instance would I or other members of my firm infer or conclude by being outvoted that it was due to bad motives, and I think with that statement I shall let the record rest at this time, your Honor.

The Court: One question. You have no reason to believe that anybody did anything other than his professional best in bringing this matter before the court?

Mr. Rosenbaum: That is my opinion, your Honor, and that is the opinion of the other partners in my firm other than Mr. Dann.

The Court: Thank you very much.

Mr. Dann: Let me ask you one thing before——

The Court: You will have the opportunity. I am going to hear everyone who wants to respond now.

Does anyone else care to be heard?

Mr. Dabney: I have given heed to the court's statement that this is not a trial, but certain statements which appear to tend to impugn the professional integrity of some of the plaintiffs' counsel have been made. If your Honor is going to give any weight whatsoever to any of those unsupported statements, perhaps we should reply. If your Honor is going to disregard them until further proof is in, I think there is no occasion to reply.

The Court: You would give the same answer to the question that I just posed, right?

Mr. Dabney: Yes.

The Court: Does anyone else care to be heard? I think, in a sense, this impliedly affects you, Mr. Morris. I don't know whether you care to be heard on this at all. There was a suggestion that the depositions did not adequately explore the areas involved. I take it you and your associate were involved in the taking of those depositions.

Mr. Morris: I was present, may it please the court, at the deposition of—I don't remember if Mr. Miller was with me—Mr. Dabney.

Mr. Miller: It was my deposition of Mr. Dabney.

The Court: I am talking about before the settlement was presented to the court.

Mr. Morris: I was not present.

Mr. Nemser: Your Honor, I think you are referring to my participation out of my firm.

I am very happy to answer your Honor's inquiry by saying, as I have repeatedly, that the depositions were well taken, were thoroughly taken, and were properly taken in all respects.

I do believe, if I may just go on for a second or two, I think we are re-exploring territory that has already been thoroughly explored both at the hearing and at various encounters before the hearing.

If I might, in order to correct a statement that Mr. Dann made when he said he invited me out to Detroit to examine his documents, I may say that Mr. Dann invited me out to Detroit after I had served upon him a notice to produce them here in Wilmington. They were subsequently produced in Wilmington, as your Honor knows, and they were

thoroughly examined here, and a report given to the court upon which we stand and will forever stand.

The Court: Does anyone else care to be heard?

Mr. Corroon: Yes, your Honor.

I participated in all but two of the fifteen deposition sessions. I participated in the sessions leading up to the execution of the stipulation of settlement and in the preparation of the notice.

So far as I am concerned, I will represent to the court that I saw nothing on the part of Mr. Dann's co-counsel that indicated that they were not trying to represent their clients to the best of their ability.

The Court: Some suggestion was made that there might be some consideration passing other than that set forth in the notice of settlement. Do you want to speak to that?

Mr. Corroon: There is none such, your Honor.

The Court: I assume the other defendants' counsel will make a similar representation? Mr. Richards?

Mr. Richards: Yes, sir.

Mr. Arsht: Yes, sir.

Mr. Herrmann: Yes, sir, I subscribe to that.

The Court: Mr. England?

Mr. England: Yes, sir.

The Court: I assume the other defendants' counsel will similarly subscribe to that.

Does anyone else care to be heard?

All right, Mr. Dann.

Mr. Dann: Your Honor, I would like to hand the stenographer a letter written by Mr. Rosenbaum under date of January 30, 1964, to all co-counsel. Needless to say, I don't want to comment upon the statements made by him here. I have been placed in a horrible position, but I don't sell out that—I withdraw that.

I would merely like to have Mr. Keller and Sam Keller return here, or I would like to take his deposition in reference to the information in my files and let your Honor see whether those men were examined with the intensity even to support a stockholders' settlement.

The Court: Is this the gentleman who testified at the hearing that you are referring to?

Mr. Dann: He was one of the gentlemen who testified.

The Court: Did you happen to hear his testimony at the hearing, Mr. Dann?

Mr. Dann: I heard part of it because I was mostly at the hotel, as your Honor may recall.

I realize the consequences to my firm but I have made every conceivable sacrifice to be an officer of this court, and I am surprised.

The Court: Anything further?

I construe this as an informal application to in effect repudiate the settlement on the ground that it was not arrived at in good faith. There is nothing in the present record which justifies that, or in the showing made here today, unless Mr. Dann himself is willing to repudiate his own testimony, because I made a great point of attempting to have that made clear in view of the conflict that arose over the representations in the notice. I was very alert to this problem, and I am sure the objectors were also alert to the problem.

So that based on the entire record here, there is nothing to justify reopening the settlement hearing, and I adhere to the opinion filed.

Mr. Dann: May I make one statement with reference to that, your Honor.

At the time that I was previously testifying I was assured that your Honor would have all of the information

before you before any of these defendants would be released, or there would be a final approval. Inasmuch as it now appears from some of the orders presented that I was mistaken or misled, I certainly can't go along with any approval of this settlement that would release all of these defendants before your Honor has had an opportunity to hear all the testimony. And if your Honor construes my statement as a repudiation of my previous testimony, although I don't consider it as such in view of my explanation, then you may so consider it.

But I certainly can't go along under these circumstances with this kind of a settlement arrangement, and certainly object to it.

The Court: Thank you, Mr. Dann. The objection is overruled. I do not consider that you have impugned any material part of your prior testimony by what you have said. The ruling stands.

* * *

Excerpts From Transcript of Hearing of February 24, 1964

[10-13] Mr. Bader: May it please the court, my name is Walton Bader. I was admitted pro hac vice previously in behalf of the objector Hoffman.

I did appoint local counsel after I received the papers on behalf of Mr. Dann, which indicates at least in my opinion a substantial question as to whether or not this entire settlement may not have been collusively arrived at between Dann and the Chrysler Corporation.

Dann has made very serious charges in his papers——

The Court. Just a minute. What was it you said, between Dann and Chrysler Corporation?

Mr. Bader: Yes your Honor. I don't have any evidence of that other than what Dann says. The only reason that that came to my attention was when Dann submitted this long petition, which has got some very serious charges in there, including statements that this matter should be referred to the Bar Association, to the Grand Jury, and to various other things.

Your Honor can understand that at this point I certainly cannot make such charges. All I know is what I have in the papers. I have no independent knowledge. But it seems to me that where serious matters of this kind have been brought up, that at least the matter should be investigated.

On behalf of the objector Hoffman I am willing at my own expense to take the deposition of Mr. Dann, to take the deposition of Chrysler, take the deposition of the corporate defendants and the individual defendants, and after 90 days be in a position to be able to inform this court, based upon what I have found in connection with these depositions, what the facts are.

At that point I would request the court either to intervene as a party plaintiff and pursue the litigation, asking the court to set aside the settlement in view of the facts involved, or in the alternative to impose further conditions on the settlement, or in the alternative to inform the court my depositions have shown nothing, and the settlement then can go forward as the court has previously advised.

But it seems to me that where charges of this magnitude and of this serious nature are made, that at least some opportunity ought to be given to investigate.

I can appreciate the court's position with respect to Mr. Dann. Mr. Dann, of course, is not in the same position as my client is. Mr. Dann participated in the settlement negotiations, and if in fact something improper was done Mr. Dann was a party to it and under those circumstances may not be heard to complain that he now doesn't like the result that has been accomplished.

But at the same time this court must consider the interests of Chrysler stockholders, and the interests of Chrysler stockholders are paramount.

The position of the objector Hoffman, of course, is not the position of the plaintiff Dann, and under these circumstances, your Honor, it seems to me that the 90-day extension would give me an opportunity to investigate the facts.

Now, I am willing to start the depositions tomorrow morning if your Honor gives me that permission, and continue those depositions to a conclusion as expeditiously and as rapidly as I know how.

I would also like to mention something else to the court.

The Court: What area do you propose to cover by these depositions?

Mr. Bader: Basically the area of Mr. Dann's charges. Mr. Dann has submitted a lengthy memorandum wherein he states that various important matters were not brought to the court's attention in connection with this settlement, which would indicate that the settlement was unfair and inequitable to the stockholders. That is basically the area that I intend to cover.

* * *

Mr. Corroon:

* * *

[15-22] Now, with respect to Mr. Bader's application, your Honor will recall that Mr. Bader attended one day of a hearing before your Honor and thereafter never saw fit to set foot in this court until today. He had the opportunity to participate in the rather lengthy hearings that were held last May. He did not see fit to do so. The matters that Mr. Dann refers to, many, many of them are matters that were covered by the allegations of the complaint, and Mr. Bader was able, if he had so wished, to cross-examine the witnesses that we put on the stand last May. He was so little interested in the matter that he never showed up.

So I submit that Mr. Bader's application is also much, much too late.

What your Honor may wish to do about the Dann application I do not know, but I suggest that Mr. Bader's application is on even a weaker footing than the Dann application because he frankly suggests that he doesn't know anything except what Mr. Dann has written.

The Court: Anything further? Mr. Miller?

Mr. Miller: Your Honor, I would like to make more or less a statement for the record.

I have received two telegrams from Sol Dann, and various letters, referring to the things which I think Mr. Bader was referring to. I think I should state for the record that if Mr. Dann produces any evidence of fraud or collusion, I will certainly go forward on the basis of whatever is produced.

But as I read the memorandum submitted by him, and the attachments to it, and as I reread his testimony in the trial this morning, most of what I see is innuendo, or charge, but apparently nothing is forthcoming with which to back up the innuendo or charge.

If he comes forward with the evidence which presumably he would have come forward with prior to now if he had it, I am glad to go forward on behalf of the position he takes, but not otherwise.

The Court: I think implicit, if not explicit, in what he has said is that the objectors didn't go as far as they should have.

Mr. Miller: I think that is implicit in it, yes, sir.

The Court: What is your response to that? Mr. Miller? You were the chief counsel for the objectors.

Mr. Miller: My response is that if he produces anything of a tangible nature, we will take it up either as newly discovered evidence or otherwise.

The Court: Actually, the material here largely was involved, was it not, at the settlement hearing itself because of his attempted repudiation of the notice.

Mr. Miller: Yes, sir. I think that insofar as the merits of the causes of action are concerned, that that was covered at the settlement. The other matters that were not covered at the settlement are his charges of wrongdoing on the part of counsel.

Excerpts From Transcript of Hearing of February 24, 1964

The Court: So the only thing that could be said to be open that at least you were not alert to is the charge of an alleged conspiracy by his attorneys, is that right?

Mr. Miller: That is true.

The Court: Did you yourself, or one of the other counsel, examine the documents that Mr. Dann had?

Mr. Nemser: That is correct, your Honor.

Mr. Miller: They were open for examination. Actually he was a witness and could have referred to any document that he wished to.

Mr. Corroon: Your Honor, Mr. Stanley Nemser, Judge Herrmann, Keith Jenkins, who testified in the proceedings, and a partner of Mr. Ehrenbard's, all examined those documents. I think Mr. Hendelman examined some of them.

Mr. Miller: I have had the opportunity to examine them, your Honor, but I wanted them here so that he could have them available in connection with his testimony.

The Court: Thank you.

Mr. Nemser?

Mr. Nemser: If your Honor please, to answer an inquiry made by Mr. Corroon, I have a record of this action here with me and I find that Mr. Newberg did appear in our action, and that was done in March of 1962. Subsequently, Prickett & Prickett made a motion in our action for leave to withdraw as his counsel, and that was granted.

Turning now to the matter of the Dann documents, your Honor, they were quite the subject of review during the settlement proceedings before this court, and a report was made to your Honor on them. Among others who were offered an opportunity to examine these documents were Mr. Bader, and Mr. Bader did not see fit at that time to take advantage of the invitation to recall the precise means by which the invitation emerged, your Honor.

We had requested the production of the documents in connection with a deposition that we planned to take of Mr. Dann. Our application was funneled into the production of documents. Mr. Dann produced a great and a large array of documents, and they were here in this courtroom on a table, if your Honor will recall.

The Court: Yes.

Mr. Nemser: We claimed a first right, since we had made the first application for the production, to examine the documents, and we started to examine them midway on the first day we came into court, and said that they were such a large number and since we all should like to see a disposition of the matter of the Dann documents during the course of the settlement hearing, rather than continue to claim any right of first examination we surrendered that and threw open the examination of these documents to all counsel, including counsel for all objectors, including Mr. Bader.

As I remember it, Mr. Handelman was the only one representing the objectors who came to the examination of documents, and he was there for a very short period.

My brother, to a major extent, and I to a much smaller extent, reviewed all of these documents during laborious sessions, and we made our report to this court. We were accompanied during all of our examination, while our examination continued as I recall for a longer period than theirs, by Judge Herrmann and by representatives of the other defendants, and the corporation.

I view it in this fashion, your Honor. I believe that much of what Mr. Dann now brings forth, or tries to bring forth, is what he has from time to time attempted to bring forth to stop the proceedings, as it were, in midstream.

We might have, as a new element in the picture, a charge of collusion which has been lodged against his own counsel in relation to the counsel for the Chrysler Corporation.

Again, however, Mr. Dann ignores the fact that there is a Gallo action which is separate and independent from the Dann action, that there are counsel for the Gallo plaintiffs who have at various stages of this proceeding taken a dramatically independent position from the Dann group, and no charges of collusion have been leveled against us. They cannot be leveled against us. And we say again, your Honor, as we have previously, that the settlement in our opinion is fair and reasonable and ought to be approved by this court.

The Court: Speaking of the settlement negotiations. I assume you were involved in those at all material times, is that right?

Mr. Nemser: Except for the matter concerned with the fee to Mr. Cobin.

The Court: Except for that matter, which you excluded, I think, at the hearing itself, when you mentioned your position.

Mr. Nemser: That's correct. And also during the negotiations, if your Honor will recall. We withdrew from it. At all other times we were there.

The Court: I ask you, like we ask a member of the board of directors, whether he was dominated or not. But solely for the record, is there anything that you have to suggest that the settlement negotiations were anything but at arms' length throughout?

Mr. Nemser: Nothing whatsoever, your Honor. They were certainly at arms' length as far as we know from the

moment that we came into the matter until the matter was submitted to the court at the hearing, and since that time.

The Court: Is there anything you know about it that would tend to suggest that the various causes of action had any more evidence to support them than the court had to consider when it filed its opinion?

Mr. Nemser: No, your Honor.

The Court: That's all; thank you.

Does anyone else care to be heard?

Mr. Bader: May it please your Honor, I would just like to say one thing in respect to what Mr. Corroon said about my appearances at the various hearings. Of course, Mr. Corroon is absolutely correct in what he stated.

The reasons why I did not appear at any hearings is Mr. Miller, who was appointed by your Honor, was so competent in handling the matter that basically all it would have meant if I had been here was going over the same grounds as Mr. Miller. The only time it became important was when these allegations of fraud and collusion were made by Mr. Dann, and these were made extremely recently. That is the reason why I did not appear at any of the prior hearings.

* * *

[28-30] The Court: Mr. Dann picked out a date in March for our notice without any consultation with the Court, so I don't feel bound to consider that date that he noticed that particular matter for.

All the matters that he relies upon are, I assume, set forth in the various communications which I have received, and by that I don't mean the underlying material which he claims is in his files. But I have read carefully all the material which he sent me, including the communications with counsel.

I think the best that can be said for his case is that if explored he might be able to obtain some admissible evidence concerning some of the causes of action.

As I understand it, in substance he has done no more than state what he stated on the witness stand at the hearing on the settlement, except now he accuses counsel somehow of a conspiracy.

The Court took this into consideration in determining what witnesses should be examined at that hearing because this very point was in the Court's mind in view of the attempt by Mr. Dann to repudiate the notice of the hearing on the settlement.

In fixing the list of witnesses to be examined, in determining the scope of the discovery permissible to the objectors, the Court was very conscious of the claim that somehow this was not a settlement fairly arrived at. If one will read my opinion on the settlement, he will see that I recognized this very problem therein. It tailored the discovery to meet some such possible accusation.

From all that I have seen that has been produced here, and I consider only Mr. Dann because Mr. Bader has no knowledge of his own but relies merely on what Mr. Dann is saying, and leaving out any fee overtones that might be involved in any aspect of this matter, it is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted.

We are not dealing here with a trial of the case but a settlement of a lawsuit. So that I think that my prior decision on discovery will dispose of the matters which Mr. Dann has raised.

To the extent he makes accusations against his counsel, let me just say that I approached the determination of the settlement by setting aside any consideration in particular

of the original plaintiffs having negotiated the settlement, and looked at it primarily from the point of view of the case made by the objectors, in order to obviate, to the extent I could, any concern about the fact that this settlement was negotiated in a context that could be considered as being an undesirable one.

But all this has been pointed out in my prior opinion. I was satisfied that the settlement was fair and should be approved after adopting that particular approach and excluding the weaknesses in the way the settlement was arrived at.

Naturally, the Court cannot decide on this record what motivations the original counsel had when they negotiated the settlement. I don't propose to do that. All I can say is that feeling as I do, a great responsibility to see that the settlement is only approved if it is fair and in good faith, I have found nothing in the matters presented to me which would justify further hearings or modification of this settlement.

So I rule that all petitions that seek an extension of time for the purpose of investigating the propriety of the settlement should be denied, and to the extent that it is necessary to add any language to your order as proposed, Mr. Carroon, I will be glad to have it added in order to accomplish that purpose.

* * *

[54-55] Mr. Bader: May it please your Honor, in going over my motion subsequent to your Honor's ruling, there was a part of the application where I asked for leave to intervene. I don't think that is necessary in view of the fact that I am an objector, but I don't presume that your Honor is denying that part of the motion, or is your Honor not passing on it in view of the rulings that your Honor has made?

The Court: You may formalize it, unless there is objection solely for the purposes of objecting to the settlement, as I understand it. You may formalize it because there is a Supreme Court decision stating in effect that an objector is an intervenor.

Mr. Bader: I knew about that decision, your Honor. I so put it in my papers. But I thought we might formalize the matter just so there wouldn't be any doubt.

The Court: Any objection?

Mr. Corroon: If Mr. Bader thinks he gets any advantage out of it, your Honor, I do object.

Mr. Bader: Well, I would like to make that application, your Honor, for your Honor's ruling.

The Court: I will grant the application. You may present an appropriate order. We understand, however, the intervention is solely for the purpose of objecting to the fairness of the settlement, and the order should so provide. I believe there are prior orders in the file so circumscribed.

Mr. Bader: I will put the condition in, your Honor. I am getting a copy of the minutes, your Honor.

* * *

Decisions of the Court of Chancery

On Approval of Settlement (December 31, 1963)

SEITZ, Chancellor:

This is the decision after hearing on the fairness of a proposed settlement of two derivative actions.

The first action was commenced by one Sol A. Dann and other stockholders against Chrysler Corporation ("Chrysler"), various directors and officers as well as certain suppliers of Chrysler. This action will be referred to as the "Dann action".

The Dann action was commenced in August 1960, and involved some twelve causes of action. After certain pleading skirmishes (See Dann v. Chrysler Corp., Del. Ch., 166 A.2d 431, 174 A.2d 696), a consolidated amended complaint was filed consisting of some 109 pages embracing fifteen causes of action and about sixty separate claims. Certain of the defendants thereafter served their renewed motions to dismiss or in the alternative for a more definite statement. The so-called Keller defendants served their motion to dismiss or for summary judgment. The defendant John W. Minor and the defendant NAFI Corporation (the only appearing supplier) filed answers denying the charges asserted against them. The defendant Robert P. Laughna filed a motion to strike and to dismiss parts of the complaint.

All the motions to dismiss were based largely on the contention that the plaintiffs could not amend their complaint so as to assert new causes of action as to those nonresident defendants who had appeared generally following the sequestration of their property. Certain motions also questioned whether the allegations were set forth with sufficient particularity. The Keller defendants raised the defense of statute of limitations.

In February 1962, Mary and James Gallo filed a derivative action against Chrysler and the then directors and certain past officers of Chrysler charging many of the same acts, omissions, and "frauds" as were alleged in the Dann complaint.

In June 1962, this court entered an order consolidating the Dann and Gallo actions solely for the purpose of discussing a possible settlement. The time fixed was subsequently extended at the request of the parties.

In the meantime (between 1960 and March 1963), four stockholder actions were commenced outside the State of Delaware embracing some of the same causes of action—two in the New York Supreme Court, one in the Federal District Court for the Southern District of New York and one in the Federal District Court for the Eastern District of Michigan. Also, Chrysler commenced a libel action against Dann in the Delaware Superior Court.

On March 6, 1963, a stipulation of settlement was filed. To facilitate the settlement a final amendment was filed by the Dann plaintiffs adding two additional causes of action which, it is suggested, incorporate the additional charges found in the New York and Michigan actions. The stipulation of settlement provides, inter alia, that all the derivative actions shall be dismissed with prejudice against all the defendants except the defendant W. C. Newberg. As to Newberg the dismissal will be without prejudice. Such fees and disbursements as the court may allow to plaintiffs shall be paid by Chrysler.

Under the terms of the stipulation of settlement, if approved, each of the individual defendants who is a party to the stipulation and all past or present directors of Chrysler, except the defendant Newberg, will receive a release

discharging each of them from any and all claims arising out of the matters alleged in the complaint and all amendments thereto both in the actions brought in this court and the "companion" actions in the New York state and federal courts. Also, the individual defendants who are parties to the stipulation will seek indemnity for their attorneys' fees incurred in connection with these actions.

On March 6, 1963, a court-approved notice of hearing on the stipulation of settlement was mailed to all stockholders. A proxy statement was simultaneously transmitted to the stockholders proposing the adoption of a modification in Chrysler's incentive compensation plan. The following language is contained therein:

> "Since the modification of the formula for computing the total provision that may be made for incentive compensation awards is a principal term of settlement and is necessary if the settlement is to be put into effect, a vote in favor of amending the 1956 stockholders' resolution to change the incentive compensation formula will, in effect, be a vote in favor of the settlement."

At a special meeting of the stockholders held on April 16, 1963, out of a total of 9,083,502 shares outstanding and entitled to vote, 6,699,016 shares were voted in favor of and 144,240 against the proposed modification.

The court also appointed an amicus to report, inter alia on "What appear to be the issues relevant to the hearing on the proposed settlement and the proof which might be of assistance to the court". This elaborate and helpful report was filed and was made available to all interested parties before the hearing. In particular, it discussed and

analyzed the evidence of record relevant to the various issues and suggested other areas which might need elaboration.

Several stockholders filed objections, and the matter was tried at some length. The objecting stockholders are identified collectively herein as "objectors", unless more particular identification is desirable.

This is the decision on the "fairness of the settlement" after hearing and elaborate briefing.

Before the specific issues are considered, a little background is in order. Chrysler, a Delaware corporation, employs directly or through its subsidiaries in the United States approximately 77,000 people. It manufactures and sells passenger automobiles and commercial cars and trucks both here and abroad. It is the third largest manufacturer of such vehicles in the United States. It also manufactures assorted products of some substance including defense materials.

I turn now to the terms of the settlement and their relationship to the causes asserted.

The "consideration" offered in exchange for the releases and dismissal of the causes of action is a modification of Chrysler's present incentive compensation plan for its employees. The details of the present plan and the proposed changes are discussed more fully later herein. The Dann plaintiffs' attorneys also urge that the changes in Chrysler's management personnel (referred to later herein as a "change in management") which occurred both prior to and during the pendency of these suits, are attributable to the activities of the plaintiffs or their attorneys. They contend that such changes effectuated one of the principal purposes of the litigation and that they pro-

vide in and of themselves a sufficient basis for approving the settlement.

The proponents agreed that the stipulation of settlement and the proposed modification of the present incentive compensation plan should not become operative until the modification was approved by Chrysler's board and by its stockholders and final approval of the settlement was granted by this court. Final settlement was also conditioned upon dismissal of the lawsuit instituted by Dann in the Federal District Court in Michigan against Chrysler and the giving of mutual releases between Dann and Chrysler of claims and counterclaims involved in the libel action filed by Chrysler against Dann in the Superior Court in Delaware plus the payment of $20,000 and disbursements to Dann's separate counsel therein.

In the stipulation all the named defendants (except Newberg) deny liability under any of the causes of action but agree that the expense of further litigation and the probable expenditure of time on the part of Chrysler's employees, officers, and directors make it desirable that the litigation be terminated without further proceedings. Plaintiffs state that the "significant and steady progress in all phases of Chrysler's operations under new management * * * with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan" can be considered an achievement of the objectives of the litigation. Thus, they state that they believe that settlement on the proposed terms is much to be preferred to continuation of the litigation and is in the best interests of Chrysler and its stockholders.

In the court-ordered notice of hearing which was sent to the stockholders, plaintiffs' attorneys made certain rep-

resentations with respect to plaintiffs' ability to recover on the alleged causes of action. These causes of action were divided by them into three categories: "(1) charges that certain past and present directors and/or officers of Chrysler have been financially interested in Chrysler suppliers and have personally profited from transactions between Chrysler and suppliers; (2) charges of mismanagement by defendants as directors and officers of Chrysler during the years 1956 to 1961; and (3) charges relating to the Incentive Compensation and Stock Option plans of Chrysler including allegations that they were not soundly devised and provided rewards out of proportion to the performance required to gain the rewards and should be appropriately revised."

Plaintiffs' attorneys further stated in the notice that while they felt that inquiry into the alleged instances of wrongdoing was warranted, they had concluded that the evidence gathered did not sustain the charges of personal interest and personal profits on the part of the defendants, except in a few instances discussed in the notice, and would not permit successful prosecution of the charges. Next, plaintiffs' attorneys acknowledged that the charges of mismanagement against the named defendants lay primarily in the area of business judgment and that the burden of proving culpability was too great to promise success in the prosecution of such charges.

Plaintiffs' attorneys stated finally that they believed their complaint concerning the "fairness" of the incentive compensation plan was well grounded and that a revision in such plan in accordance with their suggestions should be made. The revision or modification negotiated by plaintiffs' attorneys with the directors of Chrysler is said to

meet these "suggestions" in that no compensation may be awarded under the new plan until higher earnings are achieved by the corporation but a higher rate of participation is permitted once these higher levels of earnings are achieved. As to the stock option plan, plaintiffs' attorneys noted that the directors of Chrysler had already made certain changes therein.

The proponents of the settlement all contend that the agreed terms are fair and beneficial to Chrysler and ought to receive the approval of the court. The defendants, however, deny that the change in Chrysler's management and the "changes and improvements in Chrysler which have occurred subsequent to commencement of the activities of plaintiffs" are, as contended by plaintiffs' attorneys, attributable to the plaintiffs.

The objectors who have formally appeared herein take the position that the court should refuse to approve the proposed settlement on the ground that it is "unfair" to Chrysler's stockholders. The heart of their contention is that in practical effect Chrysler will receive nothing of tangible benefit as a result of the settlement, and indeed may be giving up a present advantage, while in return it will be required to deliver a release from all further liability to each of the named individual defendants except Newberg. Except for the objector Ezzes (and perhaps Koenigsberg as later considered), the objectors do not urge that there is in fact merit in any of the causes of action set forth in the amended complaints sufficient to permit a recovery thereon. Thus, they do not suggest that the "consideration" offered in return for the releases is "inadequate". Rather they contend that the proposed modification of the incentive compensation plan is merely a device agreed upon by the proponents by which the defend-

ants may avoid what plaintiffs' attorneys are said virtually to concede are worthless claims. Thus, in the view of the objectors, the proposed settlement will have the effect, inter alia, of committing the corporation to a radical change in its incentive compensation arrangement, such change having resulted not from an untrammelled exercise of discretion on the part of the directors and stockholders but from the necessity of finding a basis for settling the lawsuit.

A further and separate objection they say is the fact that the proposed modification of the incentive compensation plan, if instituted, will result in the authorization of greater dollar payments to Chrysler's employees under such plan than are presently permitted. Thus, they contend, no "benefit" can assuredly be said to pass to Chrysler as a result of the proposed settlement beyond the termination of the existing lawsuits with the consequent elimination of express and unfavorable publicity and an end to the distraction of Chrysler personnel from their corporate duties.

Parenthetically, defendants' attorneys meet these objections to the settlement head on. They of course agree that the claims are worthless, and they concede that the modification of the incentive compensation plan if approved will authorize larger payments to Chrysler executives, a number of whom are defendants herein, if the requisite earnings exist. They admit that Chrysler's directors were anxious to terminate the litigation in order to avoid further expense and embarrassment to the corporation and "were willing to consider any honorable and proper way to get these suits out of the way".

They contend, however, that as a practical matter the corporation has nothing to gain from a continuation of the

litigation and that it faces the prospect of further losses in time, good will, and expense. They urge that the modified incentive compensation plan will be an improvement over the old plan, since net earnings will have to be higher before the beneficiaries become entitled to the same dollar amounts of compensation as they would have been under the existing plan.

The defendants consider immaterial the fact that a number of them will be in a position to receive a greater dollar amount of incentive compensation for the year 1963 under the proposed plan than under the old plan. This they say is the result of Chrysler's financial success in the 1963 fiscal year and merely fulfills the purpose of the modified plan to give greater rewards for greater corporate success. They emphasize the fact that the stockholders as well as the directors approved the modification after being explicitly informed that approval was a vote in favor of the proposed settlement. Defendants' attorneys urge that even if there is doubt that the modified incentive compensation plan is better than the old plan, still the court should approve the settlement since the interests of Chrysler can best be served by terminating the litigation.

Should the court approve the settlement on the basis of the terms agreed upon by the proponents and approved in effect by the holders of a vast majority of the stock by virtue of their affirmative vote on the modification of the existing incentive compensation plan?

I should note preliminarily that the objector Ezzes charges that the 1963 proxy statement was tainted with fraud. This charge is based on the claim that the statement did not adequately or fully describe the nature of the claims and the effect of the proposed settlement. I find no merit to these charges.

Unlike the other objectors, Ezzes alone claims that there is in fact merit in many of the causes of action asserted in the Dann and Gallo complaints. He contends that the proposed settlement should not be approved by the court, because the consideration offered by the defendants in exchange for releases is wholly inadequate in view of the potential recovery by the corporation.

Before dealing with specific objections it would seem desirable to mention the record which is used as the basis for deciding this matter. The plaintiffs agreed to the terms of the settlement on the condition that they be permitted to have reasonable discovery so as to make a judgment as to whether the other claims had sufficient merit to negate the fairness of the proposed settlement. Rather elaborate discovery was undertaken. It resulted in the representation by plaintiffs in the notice to stockholders of the proposed settlement that except for the incentive compensation plan cause of action the other causes could not be successfully pursued. It is obvious, with all due regard for the integrity of counsel, that the approach taken is, at a minimum, subject to the possibility of real abuse. The court took this into consideration in passing upon the objectors' requests for further discovery. In addition the court gave counsel for the various objectors an opportunity at the hearing to interrogate certain of the knowledgeable defendants and other witnesses whom the court required to appear for the purpose of testifying to a number of these matters. I have concluded that the record is sufficient for present purposes.

The objector Ezzes claims that a number of the causes of action have merit. He so contends with respect to alleged frauds on the part of Chrysler's management in ad-

ministering Chrysler's incentive compensation plan. Strictly speaking, a number of these allegedly valid claims do not fall within the confines of the incentive compensation causes of action asserted in the Dann and Gallo complaints. The notice to the stockholders of the hearing on the settlement contains the following language:

> "In plaintiffs' discovery proceedings herein, the documents relating to the incentive compensation plan were marked as exhibits. In view of their examination into their charges against individual officers and employees of Chrysler, plaintiffs' attorneys have concluded that although there is an issue as to fairness of the existing plan, there was no invalidity in its adoption, or impropriety in the application of or calculations under the plan or any improper award of benefits thereunder except for any possible claim that Chrysler may have against Newberg. Pursuant to the stipulation of settlement of these actions, a modification of the plan as hereinafter more fully described, negotiated by plaintiffs' attorneys, will be submitted for stockholder approval."

I propose to resolve any doubt by treating each of the allegedly valid causes of action asserted by the objector as if they fell within the confines of the allegations of the complaints. I note in passing that of all the claims originally asserted by the plaintiffs only the issue as to the "fairness" of the existing (1956) plan is said to have merit in connection with the defendants who join in the settlement proposal. I observe further that nowhere in the notice to stockholders or in plaintiffs' briefs is the precise nature of the alleged unfairness in the plan spelled out.

Three of the Ezzes objections are directed toward allegedly improper practices under the 1929 Chrysler incentive compensation plan and the allegedly fraudulent adoption of the 1956 plan.

The history of Chrysler's incentive compensation plan, commencing in 1929, forms the background for these contentions of the objector. On April 16, 1929, Chrysler stockholders authorized the payment of incentive compensation in the following language:

> "This corporation may incur obligations on account of such profit sharing plans and bonus plans, provided said expenditures for any calendar year * * * shall not exceed for said year six and one half percent (6½%)[1] of the *net earnings of the Corporation for that year* * * *." (Emphasis added)

Computation of incentive compensation for the period 1929 to 1955 was governed by the 1929 resolution set out above, which provides for the application of a percentage figure to the "net earnings of the Corporation". The proponents of the settlement concede that from 1929 to 1939 the "net earnings" against which the percentage was applied was a consolidation of the earnings of Chrysler and all wholly-owned subsidiaries, domestic, Canadian, and foreign. From 1940 to 1953, however, Canadian and other foreign subsidiaries were not consolidated for incentive compensation purposes. Beginning in 1954, Canadian and foreign subsidiaries were once against consolidated. A comprehensive revision of existing incentive compensation plans was effected by the stockholders' resolution of April 17, 1956, which remains in force at the present time. The pertinent language of that resolution follows:

[1]By resolution of the Board of Directors adopted February 23, 1941, this percentage was reduced to five per cent.

> "* * * this Corporation may incur obligations on account of Incentive Plans, provided the provision out of earnings for any fiscal year of the Corporation for all Incentive Plans then in effect * * * shall not exceed five per cent (5%) (as computed by the independent Auditors of the Corporation) of the *Consolidated Net Earnings for that fiscal year (as reported in the Annual Report to the stockholders) of the Corporation and such of its subsidiaries as are consolidated in its annual statements* * * *". (emphasis added)

The Ezzes objections on these matters are first that during the period 1929-1955, payments of incentive compensation were based on computations of consolidated net earnings when in fact they should have been based on the net earnings of Chrysler alone; next, that the 1956 stockholders' resolution relating to incentive compensation "changed" the basis for payments of such compensation to consolidated net earnings though the proxy statement failed to reveal that the 1929 formula did not permit consolidation; and finally, that during the period the 1929 formula was in force, the method of computation was improperly altered from time to time.

The defendants' answer to these objections is that the 1956 stockholders' resolution, as indicated in the proxy statement, merely restated the practices that had been adopted under the 1929 resolution and did not fundamentally change them although funded debt was added to the capital base. Thus, the following statement is found in the 1956 proxy statement: "The proposed amendment generally revises the resolution of 1929 so as to eliminate what has become obsolete and to adapt the language to

present-day accounting terminology". The defendants point out that the consolidation of wholly-owned subsidiaries for incentive compensation purposes, which is expressly authorized by the 1956 resolution, had always been Chrysler's practice though the 1929 formula only refers to "net earnings of the Corporation". Also, the earnings figures which have been used for incentive compensation purposes have been those shown in the annual reports to stockholders, though no reference is made in the 1929 resolution to annual reports of earnings.

The defendants say that foreign subsidiaries were not included in the consolidated financial statements in the annual reports to stockholders for the years 1940 through 1953, because of exchange restrictions and war-time conditions in foreign countries. They contend that this situation was explained to the stockholders in the annual report for the year 1940, although that report is not part of the hearing record. Thus, they urge that the practice of basing compensation on the financial statements appearing in the annual reports to stockholders was consistently followed throughout the period 1929 to 1955.

What assessment may be made of these supposed causes of action said to exist against some of the defendants herein? The court's responsibility at this stage is merely to evaluate the probability of success if these issues were ultimately litigated and not to make a final determination. Krinsky v. Helfand, 38 Del. Ch. 553, 156 A. 2d 90.

Turning then to the above contentions of the objector Ezzes, I am satisfied that the likelihood of success on any of these claims is very small. The defenses of laches or limitations might well be applicable to each of these claims.

Moreover, assuming that Chrysler reported its earnings to its stockholders on a consolidated basis prior to the institution of the 1929 plan, no valid objection could probably be raised to the interpretation of the language of the 1929 formula adopted by the persons charged with implementing such plan. A very similar situation is presented in Meyers v. Cowdin, Sup., 47 N.Y.S. 2d 471, where the New York court in dismissing the complaint after trial noted that the earnings of the corporation there involved had always been reported to the stockholders on a consolidated basis. It concluded therefore that payments of incentive compensation based on such consolidated earnings were not improper though the formula provided for payments based on "net earnings of the Company".

Next, I think that the objector's claim that the stockholders' resolution of 1956 was induced by fraud is without substance. It is conceded that incentive payments for the period 1929 to 1955 were based on the consolidated earnings of Chrysler and its wholly-owned subsidiaries as reported to the stockholders. It follows therefore that there was no misrepresentation or inadequate disclosure when the 1956 proxy statement stated that the purpose of the revision, which I find made no change of any real substance in the existing plan, was "to adapt the language to present-day accounting terminology".

Next, I turn to the objector's claim that the persons charged with implementing the plan improperly altered computation practices without regard for the language of the various stockholders' resolutions. I note first in evaluating this claim that there is no showing that the corporation or its stockholders were damaged by any of these alleged alterations.

The objector points principally to the exclusion of Chrysler's wholly-owned foreign subsidiaries from consolidated earnings during the period 1940 to 1953. The defendants claim, however, that the practice of excluding such subsidiaries and the reasons therefor were explained to the stockholders in the 1940 annual report and that such information was filed with the S. E. C. I am satisfied that little success could be anticipated if this issue were litigated, since payments during this period were admittedly based on consolidated net earnings as reported in the annual reports to stockholders. There is no showing whatever that the alteration in the method of consolidation violated sound accounting principles, nor does the objector refute defendants' assertion that the allegedly improper alteration was fully disclosed to the stockholders.

The objector claims that there were other improper alterations in computation practices with respect to wholly-owned retail selling and leasing subsidiaries and so-called forfeitures. These claims appear to be wholly without merit. I merely note in passing, first, that the allegedly improper treatment accorded forfeitures served to reduce rather than increase the fund available for incentive compensation and, next, that the earnings of the selling and leasing subsidiaries were consolidated, in effect, with the earnings of the other subsidiaries in the annual reports to stockholders.

The objector Ezzes next complains that payments in 1955, 1957, 1960, and 1962 were improper because the language of the plan was misinterpreted so as to inflate the fund available for incentive compensation payments. The first matter under this head concerns the inclusion of state and local income taxes in 1962 as part of the fund from which "set aside" was deducted. The 1956 plan expressly

permits the inclusion of "taxes on income". The objector contends, however, that the 1929 plan only permitted the inclusion of *federal* taxes on income and that the 1956 proxy statement implied the 1956 plan would continue on the same basis.

There are several reasons why in my opinion the probability of success on this issue is small. First, there is nothing in the 1956 proxy statement that can be said to constitute a representation that the phrase "taxes on income" in the 1956 plan was to have the same meaning as "Federal taxes" in the 1929 plan. The most that may be said is that the amended language introduced a potential ambiguity in view of the former practice. Certainly this was an area where those in charge of implementing the plan were entitled to exercise their sound discretion. Also, I note that in November 1962, inquiry with respect to the proper interpretation of the language of the plan was directed to legal counsel by Chrysler's auditors. In reply, it was specifically stated that the language here in issue included state and local as well as federal income taxes. Thus, considering the factors relevant to the proper interpretation of this language, I think the likelihood of recovery from any of the defendants of the alleged overpayments for the year 1962 would be remote.

The objector next raises objection to the interpretations of certain portions of the plan which are found in the reply by legal counsel to Chrysler's auditors. I pause here merely to note that the objector disagrees with such interpretations. However, he does not point to any specific instance where payments were based on these allegedly erroneous interpretations of the plan. Thus, assuming that he were correct, there is nothing on which a recovery by the corporation could be based. I add, however, in order to

avoid clouding this issue, that the interpretation placed on the language in issue by counsel seems fair and reasonable. I conclude therefore that prosecution of this claim would probably be fruitless.

The objector claims that the 1956 plan is invalid: (1) because incentive compensation can be based on non-operating income, (2) because loss years are not averaged with profitable years, (3) because the compensation percentage is applied to before-tax rather than after-tax earnings, and (4) because compensation is based on net earnings as reported to stockholders rather than net earnings as reported to the federal government for tax purposes. I can only say that no authority is cited which suggests that any one of these reasons per se renders the incentive compensation plan invalid. At bottom, these objections are directed to the form of plan which the directors and stockholders voted to adopt. It may well be that some plan other than the one adopted would better accomplish the objectives of an incentive plan. But that of course is not for this court to say. I am satisfied that the contentions of the objector under this head offer no legal basis for attacking the 1956 plan.

The objector Ezzes also contends that all stock options issued after 1956 were invalidly issued in violation of the stockholders' resolution of April 17, 1956. I think it clear that the limitations placed in the resolution authorizing payments under "Incentive Plans" have no bearing on the issuance of stock options and that such options were not invalidly issued. While a stock option plan may indeed be considered an incentive plan, it is readily apparent that the term "Incentive Plans" appearing in the 1956 proxy statement and stockholders' resolution was not intended to and did not refer to the Chrysler Stock Option Plan.

Next, the objector claims that the cancellation of certain options in 1958 and 1959 and their reissuance at lower option prices constituted a waste of assets for which the recipients are liable. The 1959 proxy statement makes it clear that the granting of the new options, conditioned upon surrender of the old, was undertaken by the Stock Option Committee of Chrysler which was composed of directors not eligible to receive options. Each of these new options could be exercised by the holder only if he remained continuously in the employ of Chrysler or its subsidiaries for at least eighteen months after the date of its grant. The action of the Stock Option Committee was approved by the Board of Directors and by the stockholders.

The objector contends that the reissuance of stock options at lower prices constitutes a gift or waste of assets, since the committee action was taken only when it was made clear that there would be a net loss in earnings during 1958 thereby depriving certain of the defendants of incentive compensation for 1958. He also contends, citing certain magazine and law review articles, that the reissuance of stock options at lower prices ought not be permitted, since such action in effect excuses poor corporate performance.

A number of Delaware decisions I think support the view that where stock options are granted by a disinterested committee with the approval of the directors, and stockholders and where the optionee is required to remain in the employ of the corporation for an extended period of time, no legal attack may successfully be made upon such options. See, e.g., Gottlieb v. Heyden Chemical Corporation, 33 Del. Ch. 177, 91 A. 2d 57; Beard v. Elster, (Del. Ch.), 160 A. 2d 731. One may have difficulty reconciling the practice of reissuing options at lower prices with the

"incentive" aspect of the earlier grants. Nevertheless, the court would not be inclined to block reasonable corporate action in this area, particularly in view of the need of corporations to retain talented personnel.

I conclude therefore that the probability of success if this issue were ultimately litigated would under the circumstances be small.

The objector next attacks the "revolving credit agreement" negotiated by Chrysler with a number of banks whereby Chrysler was extended a credit commitment of $150,000,000. The commitment was obtained on June 12, 1958 and was continued until May 15, 1961. Although Chrysler never used the revolving credit, it nevertheless paid the sum of $2,157,533 to the participating banks during the period the commitment remained in effect.

The objector contends that six members of the nine-member Finance Committee that recommended the commitment were officers and directors of participating banks. All the members were present on June 12, 1958 when the matter was voted upon, and all voted except R. E. McNeill, Jr., President of the Hanover Bank, who had been the primary negotiator of the transaction. The Board of Directors of Chrysler voted upon the commitment at its meeting held the same day. Eighteen of the twenty-one directors were present. Of these eighteen, eight were associated with banks ultimately participating, and all voted except McNeill who nevertheless was present.

Article II, Section 9 of Chrysler's By-Laws provides that no director shall vote at a meeting of the Board on a question in which he is interested (with certain exceptions not relevant here) or be present while the same is being considered. Section 9 goes on to apply the same safeguards where a transaction between Chrysler and another corpo-

ration is involved and a director of Chrysler is a director or officer of such other corporation. The same limitation appears to be applicable to action taken by any committee of the corporation.

The objector contends that the presence of the interested directors at the meetings of the Finance Committee and the Board violated Section 9 of the By-Laws. He claims that by virtue of his position on the Stock Option Committee and Incentive Compensation Committee, McNeill had a "persuasive effect" on the other directors in obtaining their approval of the commitment. Next, he claims that Chrysler's undertaking was reckless and without diligence, since admittedly there were no studies on the subject of the revolving credit agreement before the Finance Committee or the Board at the time it was approved or while it remained in effect, though Chrysler never used the credit but continued paying for the availability of such credit. The objector seems to suggest that even if the initial credit agreement in 1958 was warranted by the circumstances then prevailing, the subsequent improvement in Chrysler's Cash and Marketable Securities and Net Current Assets required reconsideration on the part of the Board. The objector attributes all these alleged wrongs resulting in payments by Chrysler of $2,157,533 over a three-year period to the conflict-of-interest situation in which certain of the directors found themselves.

The revolving credit agreement was the subject of the ninth Dann cause of action and the sixth Gallo cause of action. Much of the evidence relied upon by Ezzes in voicing his objection to the settlement of this claim was originally produced by the plaintiffs. In the notice to stockholders plaintiffs' attorneys summarized the claim and made the following statement:

> "Upon all the evidence plaintiffs' attorneys have concluded that the credit arrangement was fair and reasonable. Apart from the question whether a technical by-law violation might still be argued, plaintiffs' attorneys have concluded that these causes of action could not be sustained in the light of business considerations and the fact that there is no evidence that any director personally profited from the transaction."

In evaluating the prospects of success on this claim I assume without deciding that Section 9 of Chrysler's by-laws was violated by the fact that a number of "interested" directors were present and voted to approve the agreement. Does it follow that the directors involved are therefore liable for the amount expended by Chrysler for the availability of the credit? It is uncontradicted that Chrysler paid no more than the going rate for the commitment. Indeed, there is no "objective" evidence that the terms were unfair to Chrysler or that the participating directors were guilty of bad faith. The thrust of the Ezzes objection is that the interlocking directors, because of their conflict of interest, recklessly committed Chrysler to a credit commitment which it did not really need. I am of the opinion, however, that the evidence of record on this matter fully supports the view, even on the assumption that the defendants must bear the burden of proof, that the commitment was reasonably necessary for the purpose that it was intended to serve and that the need therefor was reviewed periodically and reaffirmed. Considering the background and experience of the members of Chrysler's board as well as the other evidence, I do not think the absence of written studies is indicative of a lack of diligence

on the part of the directors in approving the commitment or allowing it to continue. Thus, apart from the alleged by-law violation, I am satisfied that the defendants could successfully have vindicated their conduct.

What then is the legal effect of the violation of Section 9 of the By-Laws? Certainly such conduct gives just cause for apprehension, but it does not follow in my opinion that the defendants are therefore absolutely liable for the dollar amounts paid by Chrysler for the commitment. None of the defendant directors received any personal profit from the transaction, nor did Chrysler receive less than its "money's worth". It follows therefore that any sum these defendants are required to pay to Chrysler will be in the nature of punitive, as opposed to compensatory, damages.

There are instances where the court will impose such damages in order to vindicate a legislative or other public policy. Generally speaking, however, in the absence of fraud or bad faith, a court will not upset a transaction involving corporations having even a majority of directors in common where the transaction is shown to be fair. In the present case, less than a majority of the directors were associated with banks ultimately participating, and one cannot fairly say that undue influence was exerted as to the rest. I recognize that the utmost vigilance is required in a case such as this, but where a close scrutiny of the record fails to disclose any meaningful evidence of actual wrongdoing or damage to the corporation, the monetary worth of the claim is most dubious. I conclude from the foregoing that plaintiffs' attorneys were justified in stating that these causes of action could not be sustained.

I turn next to the objector's claim that the directors of Chrysler acted recklessly in purchasing a substantial mi-

nority interest in Simca prior to 1963. The objector does not contend that there was any conflict of interest involved in this transaction. Thus, in substance he is attacking a decision involving a business judgment on the part of the directors. I am satisfied from the record before the court that the evidence adduced in support of such claim is wholly inadequate to afford any hope of meeting the heavy legal burden imposed in this area.

Both Koenigsberg and Ezzes object to the proposed settlement with the defendant NAFI Corporation. NAFI was charged in the Dann complaint with having sold inferior textile materials to Chrysler at excessive prices and in greater quantities than were needed. The defendants K. T. Keller, Samuel Keller, and L. L. Colbert allegedly were "financially interested in and involved with NAFI Corporation" and caused Chrysler to make such purchases. NAFI denied the charges though it admitted that K. T. Keller had owned varying quantities of its common stock.

NAFI is not a defendant in the Gallo action though the charges are repeated in substance in the Gallo complaint.

Under the terms of the proposed settlement the claim against NAFI will be dismissed with prejudice. NAFI will not be required to pay a consideration in any form to Chrysler. No release will be given to NAFI.

The record shows that the stock owned by K. T. Keller in NAFI never exceeded 1.05% of the outstanding common stock of the corporation. Apart from that, the record is devoid of any evidence of wrongdoing on the part of this defendant in support of the alleged claims. The objector Ezzes charges that "the proponents willfully refrained from developing evidence sufficient to enable a proper evaluation of the NAFI cause of action." I am

satisfied that the charge of "willfulness" on the part of the proponents is wholly unfounded and that the evidence adduced by the plaintiffs warranted their representation that they could not succeed in establishing that Chrysler had suffered any damages. Ezzes suggests an area where further evidence might have been sought by plaintiffs with respect to this cause of action. There is no showing by the objector, however, that any of this evidence if produced would have added substance to the alleged claim.

Next, the objector Koenigsberg seems merely to suggest that since NAFI is giving no consideration to Chrysler, the settlement should not be approved as to it. In view of the fact that both the plaintiffs and Chrysler agreed that the charges are unfounded and the record does not indicate anything to the contrary, I will approve the proposed dismissal as to this defendant if the general settlement is approved.

Ezzes also claims that the plaintiffs wilfully failed to produce evidence in support of the claims involving the so-called Consolidation Coal and National Steel transactions. Plaintiffs' attorneys represented in the notice that they had no evidence of any improprieties in these transactions. In my opinion such representations are fully supported by the extensive record on these matters. The objector says that further evidence should have been sought, but here, as in the NAFI transaction, there is no showing that the additional proof would add substance to these claims. This is particularly true because of the evidence adduced before the Court.

The claims by the objector Ezzes that the salaries paid to Colbert and K. T. Keller constitute "gifts" are without substance. There is no evidence of wrongdoing in the negotiation of either of these contracts, and the "proof"

tendered in support of the charges of breach of contract offers meager hope of ultimate success on these claims.

One other claim needs mention here. The objector Koenigsberg urges that the claims against the defendants Minor and Colbert with regard to the so-called Taxi-Ad transaction should be dismissed without prejudice and that neither defendant should receive a release or be reimbursed for his expenses by Chrysler. The objector does not contend that a real promise of success exists with respect to these claims. He states only that since neither defendant is presently an officer or director of Chrysler, neither can be said to have offered anything to Chrysler for settlement. He contends, however, that a "prima facie case" exists against Colbert.

After reviewing the evidence on this matter, I am satisfied, in view of Minor's relatively insignificant role in Chrysler's affairs and the disclosures involved, that no reason presently exists for not disposing of this claim as part of the general settlement.

Having weighed the claims asserted by the objector Ezzes to have merit and the possible defenses, I conclude that the probability of success in litigating any of such claims is so remote as to entitle them to practically no consideration in evaluating the fairness of the terms of settlement. I turn then to the claims asserted by the plaintiffs herein. The only claim which the plaintiffs now contend has merit is that which relates to incentive compensation. Let us examine this claim.

The tenth Dann cause of action and the eighth Gallo cause of action as finally amended stated several "claims" relating to the present incentive compensation plan which was adopted by Chrysler's board and stockholders in 1956.

These complaints alleged that the adoption of the plan was invalid and that the payments which were permitted thereunder were excessive and unconscionable. The formula was said to be improper because incentive compensation was permitted to be paid before the shareholders had obtained a reasonable return on their invested capital and because loss years were not set off against years in which there were profits in determining the availability of incentive compensation. Furthermore, plaintiffs claimed generally that payments had been inflated by miscalculations in applying the formula and by changes in accounting practices and policies. Finally, plaintiffs urged that as a matter of law officers found to be guilty of breaches of fiduciary duty to the corporation were not entitled to receive any incentive compensation whatever.

In the stipulation of settlement plaintiffs' attorneys represented that they had investigated the various claims under these causes of action and had reached the conclusion that the only issue that might profitably be pursued concerned the "fairness" of the existing plan. In attempting to evaluate the substantiality of this claim, however, one is met at the outset by fact that plaintiffs or their attorneys have not further delineated the nature of the alleged "unfairness" purportedly found by them in the present plan.

Let us examine the present incentive compensation plan, plaintiff's claims with respect thereto which might reasonably raise an issue as to "fairness", and the proposed modification of such plan.

Under the existing (1956) formula, incentive compensation awards may be made only for those years when consolidated net earnings of the corporation and consoli-

dated subsidiaries (as reported in the annual report to the stockholders) *before* taxes on income and before provision for incentive compensation and interest on long-term debt of the corporation, exceed 7% of the shareholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to 5% of such excess. The 1956 formula does not contain any provision limiting the bonus fund in any year to the amount of dividends declared in such year, or any other dividend limitation.

The only issue as to the "fairness" of this plan which might reasonably be said to have been raised in the Dann complaint and which has not been conceded by the plaintiffs to be without merit is the claim that the present plan is wasteful, because it permits payments to be made in excess of what could be granted under the comparable incentive compensation plans of Chrysler's principal competitors. The Dann complaint asserts that the plan should permit payments only when the income of the corporation exceeds a reasonable return on the stockholders' investment, the present Chrysler plan requiring a "set aside" only of 7% of the stockholders' investment before taxes, which is the equivalent of about 3½% after taxes. Such payments are said to have been particularly wrongful under the circumstances, because Chrysler's position in the automotive industry has declined since 1956 while the incentive payments to Chrysler employees during that period have nonetheless been substantial. A similar charge was made in the Gallo complaint.

It can be fairly said I think that, generally speaking, both the Dann and Gallo complaints challenge the set-aside percentage in the present plan as "unfair" on the ground

that the return on the stockholders' investment is too small in relation to the amount of incentive compensation that can be awarded. In this sense "an issue as to the fairness of the existing plan", as stated by the proponents in the stipulation of settlement, can be said to remain in the case. This disposes of a suggested objection to the settlement that it is not "related" to any of the causes of action. Compare Manacher v. Reynolds Metals, (Del. Ch.), 165 A. 2d 741. I pass over for the time being the problem of evaluating the probability of success on the plaintiff's part if ultimately they were to litigate this issue.

The proposed plan, as modified in accordance with the terms of the settlement, provides that for the years 1963 through 1969, incentive compensation awards may be made only for those years when the sum of (1) consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *after* taxes in income, and (2) provision for incentive compensation, and (3) interest on long-term debt of the corporation, exceeds 5½% of the stockholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the corporation during the year.

The basic changes brought about by the modification have been the conversion of what was previously a before-tax incentive plan into an after-tax plan, an increase[2] in

[2]The 7% stockholders set-aside under the 1956 formula relates to before-tax earnings, whereas the 5½% stockholders' set-aside under the 1963 formula relates to after-tax earnings. Consequently, as-

the set-aside (i.e., the return on the stockholders' investment before payment of any incentive compensation under the plan), and an increase[3] in the percentage of compensation to be awarded after deduction of the set-aside.

Thus, the 1963 formula requires a higher level of earnings before any award of incentive compensation may be made, by reason of the higher set-aside. Until the "cross-over point" is reached (i.e., the point at a still higher level of earnings where the amount of the bonus fund would be the same under both formulas), the higher set-aside under the 1963 formula would more than offset the higher rate of bonus so that a smaller bonus fund would be created under the new formula than under the 1956 formula. But once the level of earnings rises above the cross-over point a larger bonus fund will result under the 1963 formula than under the 1956 formula. However, under the 1963 formula, as a result of the increase in retained earnings, the set-aside in each succeeding year become greater than it would have been under the 1956 formula thereby requiring an even better earnings performance in each of these years to obtain the same bonus fund.[4]

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suming a 50% effective tax rate, on an after-tax basis the 7% set-aside under the 1956 formula would be equivalent to only 3½%, as compared with the 5½% set-aside under the 1963 formula. Conversely, on a before-tax basis, the 5½% set-aside under the 1963 formula would be equivalent to 11%, as compared with 7% under the 1956 formula.

[3]The bonus rate of 5% under the 1956 formula relates to before-tax earnings whereas the bonus rate of 12% under the 1963 formula relates to after-tax earnings. Assuming a 50% effective tax rate, on an after-tax basis, the 5% bonus rate under the 1956 formula would be equivalent to 10%, as compared with the 12% bonus rate under the 1963 formula. Conversely, on a before-tax basis, the 12% bonus rate under the 1963 formula would be equivalent to 6% as compared with 5% under the 1956 formula.

[4]The amicus computed that for the ten-year period 1953 through 1962, the total bonus fund would have been $3,748,713 less than it was, had the 1963 formula been applied.

To a certain extent then plaintiffs can fairly claim that they have achieved at least one of the objectives of their suit which was to increase the set aside and thereby increase the amount of income which must be earned by the corporation before equivalent amounts of incentive compensation can be paid. That is not to say of course that plaintiffs' claim as to "unfairness" in the present plan is well founded. Indeed, considering the facts of record now before the court, I think the probability was small that ultimate success could have been achieved on this issue. Because of this, however, the plaintiffs, defendants, and objectors have taken radically different approaches in attempting to sustain or attack the validity of the proposed settlement.

The plaintiffs vigorously urge that the proposed modication plus the changes in management, etc., which were mentioned before, are "beneficial" to Chrysler and accomplish the objectives of the lawsuit. Thus, the plaintiffs have attempted to formulate the settlement within the traditional framework of a quid pro quo offered by the defendants in exchange for releases from further liability.

The defendants, including Chrysler, ignore the traditional approach. They deny there is merit to any of the claims, and while they believe that the modified plan will be advantageous to Chrysler and its stockholders, they do not believe that it remedies any supposed defect in the old plan. They agree that apart from the settlement, Chrysler's management had not previously given any consideration to a modification of the existing bonus plan.

The defendants urge that regardless of the extent to which the modification can be said to "benefit" Chrysler, the court should approve the settlement as fair and reasonable.

since the expense of continuing the litigations will far outstrip any potential recovery.

The objectors, except Ezzes[5], agree with the defendants that all the claims are without merit and should be disposed of. They disagree, however, that the lawsuit may properly be settled on the basis proposed by the plaintiffs and defendants. The objectors' contentions are basically reducible to two propositions. First, it is said, the proposed modification offers no demonstrable benefit of any kind to Chrysler though, if approved, it will commit Chrysler to a substantial change in its compensation plan. Secondly, as a practical matter, approval of the modification by the court will create for Chrysler's employees, a number of whom are defendants herein, a larger fund for the year 1963 than would be available under the existing plan. The objectors say that reasonably viewed, the defendants must have been aware of such fact when they agreed to the settlement.

The objectors suggest that plaintiffs' attorneys supported the proposed modification as part of the settlement not because it would remedy some arguable defect in the existing compensation plan, but because it would give color to their claim for an allowance of attorneys' fees. The defendants were willing to accept these terms, it is said, because they were required to surrender nothing in return for their releases. Moreover, since Chrysler's earnings for the fiscal year ending in 1963 promise to exceed the "crossover point", the bonus fund will be larger than if the 1956 formula were still in effect. For all these reasons the objec-

[5]The Ezzes objections are considered above and have been rejected by the court. Ezzes, however, also joins in the objections here stated, viz., that the proposed modification is not a proper or adequate consideration for settling the lawsuit.

tors urge that the proposed settlement be rejected as unfair and unreasonable.

Having considered the nature of the claims and the possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs. Obviously in such a case settlement of the litigation is in the best interest of the corporation and in fact is much to be desired from the point of view of all the interested parties. The problem I am confronted with here, however, with due regard for the court's obligation to exercise its judgment with respect to the fairness of the settlement, lies in determining what terms may properly be accepted by the court.

Common sense it seems to me would dictate that where the hope of recovery on the part of the plaintiffs, and thus on the part of the corporation, is small, little can be demanded from the defendants by way of settlement. Certainly this is the case here.

The objectors say, however, that no settlement can be approved unless there is technical legal merit to the claims asserted in the complaint and consideration of some formal nature is offered by the defendants in exchange for their releases. Thus, they urge that if the complaints lack legal merit, they should be dismissed with prejudice. They should not be permitted to become the basis for a supposed settlement wherein the defendants offer nothing because the claims asserted against them have virtually no value.

Assuming without deciding that the rule urged by the objectors might be applicable in a case where the court could say with complete confidence that the claims lack "technical legal merit", nonetheless, it is clear that this is

not such a case. There is no doubt that in the technical sense many of the asserted claims would survive a motion to dismiss, assuming the defendants chose to press such a motion. Thus, if the court were to reject the proposed settlement, the parties would merely be in the position of having to continue the litigation. It is just this situation which, with some justification on either side, both plaintiffs and defendants hope to avoid. Under the circumstances, I think that the court need only determine whether the terms are fair when measured against the probability of recovery on the asserted claims.

The objectors next contend, however, for a wide variety of reasons, that the court ought not accept a modification of the incentive compensation plan as the basis for settlement. First, apart from the fact that the modified plan is likely to give the individual defendants a greater return than the old plan for the year 1963, the objectors contend that the proposed plan cannot be shown to be an improvement over the old plan and therefore is not a "valuable consideration" offered by the defendants for settlement. The basis for this contention is that no one can adequately foresee what the future holds for Chrysler in the way of profits. The objectors purport to show that it is probable that Chrysler will operate in the future at or above the cross-over point and therefore that the payments to Chrysler employees will probably exceed what they would have been under the old plan. This conclusion, however, rests on the selective use of available financial data with which in my opinion one may either agree or disagree. The objectors say, however, that in any case the modification must be rejected because the proponents have the burden of showing that the modification will result in smaller incentive payments or otherwise provide some de-

monstrable benefit to the corporation and this they cannot do.

It is fair to say I think that no one can predict with certainty what degree of success Chrysler will have in its operations in future years. Although Chrysler enjoyed a series of profitable years from 1950 to 1957, it showed a loss in 1958 and 1959. No one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables, some of which have little, if any, relationship to the amount of effort exerted by management. To that extent of course the objectors are justified in asserting that the proponents cannot "prove" that incentive payments will be smaller in any particular year in the future. All that may be said in the final analysis is that under the proposed modification earnings will have to be higher, up to the cross-over point, in order for payments to be the same as they would been under the old plan but once that point is exceeded, payments can be larger.

Does the fact that there is no assurance that the fund and thus the probable payments in any particular year will be smaller under the proposed formula than under the existing formula vitiate the modification of the incentive compensation plan as the basis for settlement? Clearly there are dangers involved in this type of settlement where the only "consideration" offered by the defendants is the taking of some corporate action which not only involves no immediate detriment to the "charged" defendants or "assured" benefit to the corporation but also may in fact ultimately result in larger compensation payments to the defendants, among others. That is only to say, however, that each such case must be considered on its own merits. The

objection made is not so much that the defendants are not giving a sufficient "consideration" but that they are purporting to give a consideration when in fact they are giving no consideration at all. The objectors state that they would prefer the actions to be dismissed rather than settled on the proposed basis. Since a refusal to approve the settlement cannot be equated with a dismissal of the actions, the objection here seems clearly to be related to plaintiffs' claims for an allowance of attorneys' fees rather than opposition to the termination of the pending litigation.

I am satisfied that as a practical matter settlement on the basis of the proposed modification is fair and reasonable subject to the limitation hereinafter imposed. Rejection of the settlement generally would clearly not be in the interest of Chrysler or its stockholders. While, as I have indicated before, there can be substantial disagreement as to whether the proposed change in the incentive compensation plan is an "improvement", there is no substantial showing that it will be detrimental to Chrysler to the extent that this issue may be said to be poised in the balance. I think that the overwhelming approval of the modification by Chrysler stockholders with the knowledge that they were in effect approving the settlement constitutes a "plus" for the approval of the settlement.

Because much is made of it, I next consider the additional contention of the Dann plaintiffs that the "change" in Chrysler's management which has presumably occurred is itself sufficient consideration for settlement of the lawsuits. The Dann plaintiffs charged in their complaint that certain directors, officers, and employees of Chrysler were guilty of gross mismanagement, and they sought, inter

alia, the appointment of a receiver for Chrysler. The Dann plaintiffs contend that a major objective of this litigation has been to effect a change in Chrysler's management. They claim that the present lawsuit coupled with Dann's earlier activities is substantially responsible for such change or changes as have occurred in Chrysler's management.

Assuming without deciding that Dann's activities both before and after the filing of the complaint produced what he now describes as a "change in management", how, one asks, does that fact bear on the issue as to the fairness of the proposed settlement?

The defendants deny that any changes or improvements in Chrysler which may have occurred since the commencement of the plaintiffs' activities are attributable to the plaintiffs. It is certain, in any event, that the so-called change of management is not a "benefit" tendered to Chrysler by the defendants as a term of the settlement.

As I view the matter, it makes little difference on the issue as to the fairness of the settlement whether plaintiffs are credited with the presumed change in management or whether such changes are in fact beneficial to Chrysler. The paramount factor, as was noted before at some length, is that Chrysler and its stockholders have little to gain from a continuation of these litigations. Even if I were to conclude that these changes of personnel are not attributable to the plaintiffs, it could hardly be urged that the court should therefore withhold its approval of the settlement.

The objectors offer certain other reasons why the settlement on the proposed basis should be rejected. First, they say that modification of the incentive compensation plan could have been undertaken by the directors and

stockholders apart from settlement if the modification were thought worthwhile. This is of course true, but it does not follow that the old plan was improper. Indeed, the record would support a contrary conclusion. This being so the new plan and tender thereof as a basis for settlement cannot be evaluated as merely the result of their having performed their duty.

The objectors next say, however, that stockholder approval should be disregarded here because the stockholders may have felt that the modified plan should be adopted not because it is meritorious in and of itself, but because it was in the interest of the corporation to terminate the litigations. Assuming that the psychological motivation of the stockholders was as the objectors suggest, nonetheless I do not think their objection is of decisive significance. After all, the most that may be said is that the stockholders were called upon to make a business judgment weighing the desirability of continuing the litigations against the supposed merits of the modified plan. Their approval is at least some evidence that the terms of the proposed settlement are fair. To this may be added the fact that the raising of the so-called cross-over point should certainly in the long run result in an increase in the stockholders' equity.

Finally a point is made that the tendered plan is incompatible with the legal principle found in Nadler v. Bethlehem Steel Corp., 38 Del. Ch. 427, 154 A. 2d 146, and Duane v. Menzies, 37 Del. Ch. 416, 144 A. 2d 229 to the effect that the tendered terms of settlement must be sufficiently definite and beneficial to be capable of present valuation at least in a comparative sense. First of all, the approval of this settlement will not constitute a judicial imprimatur of its future operation. Indeed, the court in

the Nadler case later approved a settlement after it was made clear that its future operation was not being approved. While it is true that there is no assurance that during the "term" of this plan there will be a monetary "saving" to the corporation, the fact is that business-wise it should benefit the corporation. Therefore, considering its inherent limitations and the limited qualifications hereinafter imposed, I do not believe that the Plan runs afoul of either the Nadler or the Menzies cases.

I therefore conclude that in the application of the governing standards this settlement should be approved with one qualification. It is clear that the directors "bargained" for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the "new" plan would produce a substantially greater fund than would the old plan for 1963. Thus, even with due allowance for the fact that the future operation under the plan is an "unknown", I do not believe that it is appropriate for the director defendants who are beneficiaries under the plan to receive the fruits of the new plan for 1963. I will therefore approve the terms of settlement on the condition that the director defendants who are beneficiaries under the plan agree that as to the year 1963 they will derive no added financial reward solely as a result of the modification. If they so agree I will expect counsel to suggest mechanics by which such a result can be achieved. If counsel cannot agree they may submit suggested alternatives by a fixed date.

One further matter of substance requires attention. Under a separate arrangement Chrysler has agreed, if the present settlement is approved, to pay a $20,000 fee to

Dann's attorney in the libel action in the Superior Court. The Sandler objectors say that this payment is an "improper preference" to Dann over other stockholders and therefore should be disapproved by the court.

The testimony disclosed that at least some of the $20,000 payment is justified by Chrysler on the basis that it represents, in part, payment for legal services rendered the Dann plaintiffs in this litigation by the attorney involved. The balance is presumably justified on the basis of a business-judgment settlement by Chrysler of the libel action which was complicated for Chrysler by a contemplated counterclaim by Dann for damages based on alleged abuse of process.

Preliminarily, the court is not asked to "approve" the $20,000 payment. Thus, contrary to the request of the Sandler objectors, it cannot "disapprove" the payment as such. As a practical matter, all the court can do at this stage is disapprove the entire settlement on the ground that the intended payment renders the entire settlement unfair. I note, however, that the Sandler objectors do not urge that the settlement be disapproved on this score. They merely ask that the court not permit this payment.

In discharging my duty here, I have considered this dubious fee arrangement a negative factor in arriving at my judgment concerning the fairness of the terms of settlement. However, I do not consider it a sufficient basis for refusing such approval. If I felt that the payment were a sham or device to provide an out of court "pay-off" to obtain a settlement which ignored the interest of the stockholders generally, I would not hesitate to withhold approval of the settlement. The record, however, does not

warrant such a conclusion. Moreover, the Gallo plaintiffs and their attorneys, who helped negotiate this settlement, did not participate in any of the negotiations surrounding the disposition of the libel action. Thus, I do not think the fairness of the settlement herein is in fact impugned by the agreement to pay a fee to Dann's separate counsel.

However, I think it apparent that the payment of the $20,000 fee is, euphemistically speaking, intimately connected with the settlement of the derivative actions. Thus, to the extent that any of the intended fee represents payment for services allegedly rendered in connection with these actions, the effect of the arrangement would be to circumvent the powers generally exercised by this court in supervising such payments.

Thus, while the settlement itself ought not be disapproved as "unfair" because of the proposed payment, I am of the opinion that disposition of this fee matter should await the hearing on the question of plaintiffs' fees generally. Perhaps Dann and Chrysler will agree that payment of the stipulated sum or any part thereof will abide a decision by this court as to its propriety when judged by controlling Chancery standards. If not, then the matter will be considered in determining whether and to what extent Dann is entitled to reimbursement for counsel fees herein.

Other assorted matters not herein mentioned have been considered. They have been determined either to be consistent with the conclusions herein reached or irrelevant thereto.

Present order on notice.

On Motions for Reargument

Motions for reargument have been filed by the Ezzes, Koenigsberg, and Sandler objectors. They say the settlement should be approved only on the condition that the new incentive compensation plan takes effect as to all beneficiaries on January 1, 1964 rather than January 1, 1963, as provided in the proposed settlement. The basis for their contention is found in this court's prior opinion. There the court said that the settlement would be approved on the condition that the director defendants who are beneficiaries under the plan agree that as to 1963 they will receive no additional financial reward solely as a result of the modification. This was done because it was found "that the directors 'bargained' for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963".

The objectors in effect say that there is no reason why any beneficiaries of the plan, not merely the director defendants, should benefit in 1963 when the financial picture for that year was as indicated, particularly since the new plan was tendered as a settlement device. In their answer to the objectors' motion, certain defendants say that the court erred in finding that the directors bargained for this settlement in the context above quoted. Thus, they say the condition was imposed on the basis of an erroneous premise and it would therefore be compounding the error to extend the condition to all the beneficiaries of the plan. They say that only one director participated in the negotiations and that he largely settled the terms as early as February 1962.

The problem under consideration must be evaluated in the light of the function the court was called upon to perform, viz., to pass upon the fairness of the settlement. Parenthetically, when the court was writing the original opinion, it considered the possibility of imposing the condition now suggested by the objectors.

Because the changed incentive compensation plan, rather than any "consideration" flowing from the real defendants, was tendered as the basis for the settlement, the court felt compelled to evaluate carefully the result of the change particularly insofar as the director defendants were concerned. It was reasonably clear to me from the record that there had been general public acceptance of Chrysler's cars for the model year 1963. This was evident not only from the earnings picture for the last quarter of 1962 but from the figures for most of the first quarter of 1963. These matters plus the general financial prospects for Chrysler were of course known when Chrysler agreed to the settlement in final form in late February 1963 and again when the board confirmed the settlement in late March 1963. The knowledge and expectations of the defendant directors concerning Chrysler obviously put them in the position where they at least for the year 1963 could obtain a complete release from the litigation not only without paying anything personally but by finally approving a revised plan which would probably assure them even greater compensation payments for 1963.

In my prior opinion I used "bargained" in relation to the time the matter ripened for judicial consideration. Perhaps "bargained" was an unhappy choice of language. It might have been better to say "finalized". In any event the settlement cannot be justified by the directors by refusing to

consider what the true situation was when the matter was finally ripe for submission to the court. They had a continuing duty to the stockholders to agree only to what was then fair.

I also note that the defendants' answer to the motion emphasizes that the new plan was negotiated by one director and that the director defendants subject to the condition constitute a minority of the entire board of directors. From these facts they seem to be suggesting that the imposition of the condition is either unfair or is based on actions which were not under their control. I need not consider the legal niceties of this problem in the context of mere adversary proceedings. As noted, the directors approved a settlement in the light of a profit picture which resulted in benefits to certain members of the board. Minority or not, the result was reasonably certain to provide some of its members who were defendants with a benefit at least for 1963 which was greater than they would have received had the lawsuits been litigated and decided in their favor. In the face of the total picture presented, particularly in view of defendants' evaluation of the merits of the lawsuits, this was a benefit which I felt in fairness should be removed.

Thus, the court does not feel that the premise in the prior opinion for imposing the condition upon the director defendants is unwarranted. Nevertheless, this does not aid the objectors here because the non-director beneficiaries of the plan were not personally involved in approving the change and making it applicable to 1963. Also, not being defendants, they were not receiving any benefit for the release of corporate causes of action against them. Moreover, in the long view of this plan one cannot say with

objective assurance whether it will or will not be more beneficial to the participants. Indeed, it may be less so. Thus, the court adheres to the limited condition imposed in the prior opinion.

The Sandler objectors also argue that the court should adopt the January 1, 1964 date generally, because it now knows the effect of the new plan for the year 1963. Passing over the element of hindsight, I believe this point overlooks the fact, noted above, that we are dealing with a seven year plan. The fairness test cannot be applied by looking at the results of only one year. The imposition of the condition on the defendant directors was imposed for reasons special to them.

Other grounds for reargument either are adequately treated in the prior opinion or do not call for any change therein. Thus, the motions for reargument are denied.

Present order on notice.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 893

ARTHUR HOFFMAN,

Petitioner,

against

CHRYSLER CORPORATION, ET AL., and PAUL C. ACKERMAN, ET AL.,

Respondents, Defendants below,

and

SOL A. DANN, ET AL., and MARY L. GALLO, ET AL.,

Respondents, Plaintiffs below,

and

ERWIN H. EZZES, HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, ET AL.,

Respondents, Objectors below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION

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IN THE

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ARTHUR HOFFMAN,

Petitioner,

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and

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BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION

Opinions Below

The opinions of the Court of Chancery of the State of Delaware are reported as *Dann* v. *Chrysler Corporation*

in 198 A. 2d 185 (1963) [Gallo A1-41]*. The opinion of the Supreme Court of the State of Delaware, affirming the judgment of the Court of Chancery, is reported as *Hoffman* v. *Dann* in 205 A. 2d 343 (1964) [Pet. A9-30].

Jurisdiction

The petitioner claims that the jurisdiction of this Court is founded on 28 U. S. C. § 1257(3). He contends that federal questions are raised involving abridgement by the Supreme Court of Delaware of the "privileges and immunities" and "due process of law" clauses of the Fourteenth Amendment to the Constitution of the United States.

The Gallo respondents submit that there is an absence of jurisdiction for this Court to entertain the instant petition since petitioner did not assert any alleged abridgement of his constitutional rights either before the Supreme Court of Delaware or before the Chancery Court of Delaware; and further, because he raises no federal question in his present petition.

Questions Presented

The proceedings before the Delaware courts involved a determination of the fairness and propriety of a proposed settlement of two stockholders' derivative actions

---

* References will be made to the Appendices to this brief (Gallo A), to petitioner's brief (Pet. A), and to the printed appendix of the defendants-appellees in the court below (A). References to portions of the Transcript of the settlement hearing not printed in the appendix of the defendants-appellees in the court below will be T references. Docket entry references will be denominated S. Ct. Dkt. # , for those of the Supreme Court of Delaware; Gallo Dkt. # , for those of the Gallo action in the Court of Chancery; and Dann Dkt. # , for those of the Dann action in the Court of Chancery. Gallo exhibits will be referred to as GX and defendant exhibits as DX.

which had been instituted in the Court of Chancery of Delaware in behalf of Chrysler Corporation (hereinafter "Chrysler") for alleged waste and mismanagement. No federal statute is involved on the instant petition. Chrysler is a Delaware corporation. Both the adjectival and substantive laws of Delaware are applicable.

The petitioner predicates his application for certiorari on the grounds that the Delaware courts did not permit the objecting stockholders to try the issues of the case on the merits and that the Delaware courts failed to follow decisions of this Court relating to claims of fraud and the judicial inquiry thereon.

The Gallo respondents will presently demonstrate:

1. That petitioner did not cite as error to the Delaware courts any violation of the Constitution of the United States. Petitioner now for the first time anywhere contends in his present petition that there has been an abridgement of rights under the Fourteenth Amendment.

2. That there is no federal question involved:

(a) The Delaware courts afforded all parties and stockholders of Chrysler, including petitioner and the other objecting stockholders, full opportunity to be heard, upon due notice, as to the fairness and propriety of the proposed settlement, in accordance with established judicial procedures.

(b) The petitioner and his attorneys neglected to avail themselves of their right to be heard by failing to attend any of the settlement hearings before the Chancellor except for one pre-testimony session, or to submit any substantive post-hearing brief. They further failed to attend the hearing on oral argument of the several appeals to the Supreme Court of Delaware, including petitioners's own appeal to that court.

(c) The Court of Chancery made a thorough inquiry into the fairness and propriety of the proposed settlement.

(d) The petitioner is seeking to have this Court review the determinations of the Delaware courts with respect to Delaware law.

(e) There is ample support in the record for the approval of the proposed settlement by the Delaware courts.

Counter-Statement of the Facts

The petitioner's statement of the facts contains many errors. A counter-statement is necessary.

A. History of the Litigation.

The Delaware litigation involved two stockholders' derivative actions. The first was instituted by respondent Dann and certain other plaintiff stockholders on August 12, 1960 (Dann Dkt # 1). Until December 7, 1961, there were various determinations of motions relating to pleadings and discovery, including the decisions of the Chancellor in *Dann* v. *Chrysler Corporation* reported in 166 A. 2d 431 and 174 A. 2d 696. The defendants sought discovery of relevant documents in Dann's files which Dann had stated on various occasions contained information relating to misconduct of defendants (A287-335). Under direction of the Chancellor, subject to safeguards for privileged documents and the names of alleged informants, Dann produced, as he averred, "all material relevant to the issues involved in the complaint, as amended, in this suit, received by him prior to January 1, 1961" (A330). His own attorney had inspected the documents in Dann's files for three days and "separated out what I considered pertinent to the complaint as then amended" (A329, 309-310). Those documents were thereafter filed with the Court of Chancery and formed part of the record on the settlement (A388).

On February 23, 1962, the Gallo plaintiffs instituted their derivative action (Gallo Dkt. # 1). Procedural activities affecting both actions then followed. Finally, by order dated June 14, 1962, the Chancellor consolidated the two actions solely for the purposes of discussing possible settlement (Gallo A2). Subsequently, the time originally fixed for such discussions was extended at the request of the parties (Gallo A2).

The proposed settlement was the end product of arm's length bargaining between the plaintiffs and the defendants in the context of the claims asserted, the defenses interposed and the final disposition of the total litigation. The intense negotiations covered more than one year and until the very end there was no certainty that the final result of settlement would be accomplished (A122-132).

Throughout the course of the litigation from the time that it was instituted, the Gallo action was separate and independent from the Dann action (A455). Counsel for the Gallo plaintiffs, with the assistance of an accounting expert and adviser, actively and independently participated in the negotiations for settlement (A455-456, 169). The Gallo plaintiffs and their counsel reached an independent judgment that the ultimate settlement was fair and reasonable (A455-456). Their judgment, as well as that of counsel for the plaintiffs in the Dann action, was based upon elaborate discovery (Pet. A9; Gallo X600).

Petitioner, in his statement of the facts, completely overlooks the participation by the Gallo plaintiffs in the settlement negotiations. He would have this Court believe that Dann alone negotiated the settlement with the defendants. This is plain error. In fact, counsel in the Dann action were not negotiating solely for Dann but also for his co-plaintiffs in the Dann action. Dann did participate in the settlement negotiations and his law partner was one of the signatories to the settlement agreement (A40).

The proposed settlement is contained in the Stipulation of Settlement dated March 5, 1963 (A31-42). The heart of the settlement is the modification of the Chrysler Incentive Compensation Plan (Gallo A4). Charges of unfairness in the application of the old formula under that Plan are alleged in paragraph 107 of the Gallo complaint (A69) and paragraphs 202 and 204 of the Dann complaint (A52-53). The differences between the old and new formulae are analyzed in the decisions of the Delaware courts (Gallo A25-29; Pet. A23-24).

It was the considered opinion of plaintiffs' attorneys in their evaluation, after discovery proceedings, of the causes of action pleaded in the Dann and Gallo complaints that (1) charges of personal interest and personal profit on the part of the individual defendants (except Newberg) were not sustained by the evidence and this would not permit a successful prosecution of them; (2) charges of mismanagement lay primarily within the area of business judgment, and although criticisms might be levelled at some of the transactions questioned, the burden of proving culpability on the part of the defendants was too great to promise success in the prosecution of those charges; and also brought into the balance were the management changes and the then recent management accomplishments. As to charges of unfairness of the Incentive Compensation Plan, plaintiffs' attorneys believed they were well grounded and a revision of the Plan was necessary to prevent awards unless the officers and employees should produce results of a magnitude which would merit their participation with stockholders in earnings, and the rewards should then be scaled to the measure of accomplishment (A8-9).

B. Proceedings in the Court of Chancery of Delaware on the Proposed Settlement.

After the Stipulation of Settlement was filed, pursuant to the Chancellor's order, a court-approved Notice of Settlement was mailed to each stockholder of Chrysler (A7-30).

The elaborately detailed Notice was enclosed with the Proxy Statement (DX300) for the Annual and Special Meetings of Chrysler stockholders held on April 16, 1963, at which, *inter alia*, the Chrysler stockholders were to vote on the proposed modification of the Incentive Compensation Plan (DX 300, Exh. "C"), subject to Court approval of the proposed Settlement (Gallo A4-5). The stockholders were advised in the Proxy Statement that a vote in favor of the Plan modification "will, in effect, be a vote in favor of the settlement" (Gallo A3; DX300, p. 20). The stockholders overwhelmingly favored the settlement and the proposed Plan modification by the vote of 6,699,016 (or 97.89% of those voting) to 144,244 (A79).

At the time, petitioner Hoffman held 10 shares of Chrysler stock (Dann Dkt. #180). He would at the present time have been the holder of 40 shares of the stock because of the effect of two 2 for 1 stock splits that occurred in the interim. However, after the settlement hearings, he disposed of part of his holdings, so that he presently owns only 20 shares of Chrysler stock (Gallo A44).

Prior to the opening of the settlement hearings on May 13, 1963, various objectors, including petitioner Hoffman (Dann Dkt. #180), filed notices of intention to object.

Dann, however, again raised the matter of the documents in his files which he contended contained information as to misconduct by defendants.

A pre-trial hearing was held before the Chancellor on April 11, 1963, at which the matter of the Dann documents was further considered (A356-374). The court concluded that the hearing on the settlement should proceed as scheduled.

The Gallo plaintiffs took immediate steps to determine whether Dann in fact had any evidence in his files. They had believed that the heart of Dann's documents had been theretofore produced by him on the defendants' discovery

of his papers. Such documents had been considered in connection with the settlement negotiations. Accordingly, the Gallo plaintiffs moved for the production of all of the documents in Dann's files to which he adverted and they also noticed the deposition of Dann (A377-379). Dann objected to any further production and to the taking of his deposition (A381-383). The Chancellor ultimately directed that Dann produce the documents for inspection and that he appear to testify at the settlement hearing on May 13, 1963 (A393-396).

All of the Dann documents were produced at the settlement hearing for inspection. Full right and opportunity were afforded to all parties and all objectors or their attorneys to inspect those documents (A396, 397-401, 402-408, 421). They were inspected by attorneys for the Gallo plaintiffs through two full days and two night sessions, and on a third day through the late afternoon (A408). In addition, attorneys for objector Ezzes, for Chrysler and for certain of the other defendants also inspected the Dann documents during that period (A453-457).

While petitioner Hoffman and his attorneys had the same right and opportunity of inspection, they did not see fit to exercise that right (A454-455).

The attorneys for the Gallo plaintiffs presented an oral report to the Chancellor during the settlement hearing with respect to their inspection of the Dann documents, concluding that:

> "In essence, the material is of the same kind and nature as the material heretofore filed by him (Dann) with this Court, which contained the heart of his documents at the time. We are of the opinion, as the result of our inspection, and we so represent to this Court, that the Dann documents do not comprise evidence. Accordingly, the Gallo plaintiffs adhere to their position, proposing the Court approval of the settlement of this litigation as submitted." (A408-409)

Dann also testified at the settlement hearing and was cross-examined by the attorney for objector Koenigsberg (A410-421). Here again, petitioner Hoffman and his attorneys had full opportunity to cross-examine Dann but did not see fit to do so. Dann testified in support of the proposed settlement and conceded that his documents did not contain admissible evidence (A410-421).

The Chancellor granted the objectors the widest latitude of discovery and call of witnesses at the settlement hearing (A458). The court delved deeply into each cause of action which any of the objectors considered might have merit (A459). The objector Ezzes contended that a large number of the causes of action had substantial merit. As the decisions of the Chancellor and the Supreme Court of Delaware attest, objector Ezzes' presentations of evidence and argument were carefully considered in every respect and were found to be without substance (Gallo A10-24; Pet. A11-21). The other objectors concurred with the plaintiff's attorneys in most regards in their evaluation of the causes of action apart from the Incentive Compensation Plan cause (Gallo A7).

As to the proposed modification of the Incentive Compensation Plan itself, the record is replete with exhibits and testimony offered at the settlement hearing attesting to the improvement of the new formula over the old (A94-106; 248-265; DX308-311). The highest echelon of Chrysler executives was closely examined and at length with regard to the modification and the settlement negotiations that led to it (A94-106, 132-133; 143, 156, 248-265).

In addition, prior to the hearing the Chancellor appointed an *Amicus Curiae* to inquire into and report on what appeared to be the issues relevant to the proper consideration of the proposed settlement and the proofs which would be of assistance to the court. A lengthy and detailed report was submitted (Gallo A3; Pet. A10).

The following witnesses gave testimony at the hearing:

Walter J. Simons	Treasurer of Chrysler	T. 29-243
George H. Love	Chairman of the Board of Chrysler	T. 248-358
Lynn A. Townsend	President of Chrysler	T. 373-565
Gwain H. Gillespie	Partner of Touche, Ross, Bailey & Smart, Certified Public Accountants, in charge of Chrysler audit	T. 582-629 T. 708-714
Emlyn Lloyd	Director of Supplier Relations, Purchasing Department of Chrysler	T. 630-671
Robert G. Page	Director of Chrysler and Chairman, Incentive Compensation Committee	T. 673-707
Lester L. Colbert	Former President and Chairman of the Board of Chrysler	T. 715-827
Kaufman T. Keller	Former President and Chairman of the Board of Chrysler	T. 829-838
Keith A. Jenkins	Attorney on legal staff of Chrysler	T. 842-866
Sol A. Dann	A plaintiff in the Dann action	T. 891-915
William H. Ryan	Certified Public Accountant, for Objector Koenigsberg	T. 917-950
Francis S. Bensel	Partner of Kelley Drye Newhall Maginnes & Warren	T. 951-964

In addition to the comprehensive testimony, including cross-examination, of the foregoing witnesses, and the voluminous exhibits introduced at the hearing, the record also contains the depositions taken by the plaintiffs in the discovery proceedings prior to final settlement (Gallo X600). Ten witnesses were then examined—George T. Higgins, Secretary of Chrysler; Louis B. Warren, director of Chrysler and partner of Kelley Drye Newhall Maginnes & Warren; Francis W. Misch, director and Vice President—Finance of Chrysler; Emlyn Lloyd; Lester L. Colbert; Paul C. Ackerman, director and Vice President—Engineering; Richard D. Morrison, Purchasing Agent—Materials and Supplies of Chrysler; Rinehart S. Bright, director and Vice President—Operations Staff; Kaufman T. Keller; and Robert P. Laughna, former executive of Chrysler.

Petitioner Hoffman and his attorney failed to attend any of the settlement hearing trial sessions, although he had filed objections and appeared as an objector. His attorney attended only one pre-trial session on May 1, 1963 (Dann Dkt. #213). The pre-trial sessions were held on April 11, 1963 (A356), April 18, 1963 (A384), May 1, 1963 (Dann Dkt. #213), and May 6 and 7, 1963 (A396; Dann Dkt. #231). The settlement hearing trial sessions were held on May 13, 14, 15, 16, 17 and 20, 1963 (T. Vols. I-III; Dann Dkt. #233-235).

After the close of the settlement hearing, extensive briefs were filed by the proponents and the objectors (Gallo A4), except petitioner Hoffman. His brief consisted of only two pages without any substantive presentation (Gallo A42).

On December 31, 1963, the Chancellor filed his decision approving the settlement subject to a limited condition, which was complied with by the defendant directors involved (Gallo A1-38).

Applications were made by objectors Ezzes, Koenigsberg and Sandler for reargument, which were denied by the

Chancellor in his supplemental opinion of February 7, 1964 (Gallo A38-41).

After testifying at the settlement hearing Dann asked to be "excused permanently" and for leave to take back to Detroit the documents which he had produced. The request was granted by the court (A421). Nevertheless, after the Chancellor's decision, Dann once again appeared before the court on an application by him, *inter alia*, to reopen the settlement. The application was heard by the Chancellor on February 7, 1964 (A431-448). The core of his contentions at that late juncture was basically a reiteration of his previous positions with respect to the documents which he had produced at the settlement hearing (A431-440). In effect, Dann was seeking reexploration of matters that had been theretofore thoroughly explored by the Chancellor at the settlement hearing and at the pre-trial hearings (A444). Dann, significantly, did not repudiate his testimony at the settlement hearing (A438). The court reaffirmed its determination that the settlement was arrived at in good faith and denied Dann's application (A446-447).

Thereafter, by motion filed on February 24, 1964 (Dann Dkt. #282; Gallo Dkt. 98), at the tail end of these exhaustive proceedings, petitioner Hoffman appeared. He had not seen fit to participate actively as an objector or even to be represented independently at the sessions, of the settlement hearing. Nevertheless, he now sought a variety of reliefs. He sought intervention, the right of discovery including depositions by his attorneys of Dann and all of the defendants named in both actions (some 100 individuals and corporations) and the production of all books, records and documents relevant to the issues in the case, and a stay of the settlement (Gallo A43). He requested ninety days for the discovery. Hoffman was afforded a hearing on this matter before the Chancellor on February

24, 1964 (A449-461). In his motion papers, Hoffman made the following averment (Gallo A44):

> "I must confess to the Court that my specific knowledge of the charges involved has been derived from a reading of the Dann and Gallo complaints and from the proceedings in connection with the proposed settlement. I have no personal knowledge of the matters involved nor have I taken any depositions in connection therewith."

Hoffman predicated his motion entirely on Dann's previous application to reopen the settlement (A449-450). After hearing, the court reaffirmed its determination that the settlement was fair and entered into in good faith, and denied Hoffman's motion except that he was granted leave to intervene as a party plaintiff for the sole purpose of objecting to the fairness and adequacy of the settlement (A460). Final decree and judgment approving the settlement was filed on March 9, (Gallo Dkt. #105; Dann Dkt. #301).

C. Appellate Proceedings in the Supreme Court of Delaware.

The objectors, including Hoffman, appealed to the Supreme Court of Delaware. Dann did not appeal. Briefs were submitted by all interested parties. The petitioner's statement in his brief to this Court that he argued "the Constitutional questions involved" before the Supreme Court of Delaware is clearly not so. In neither his ten-page principal brief (S. Ct. Dkt. #4) nor in his seven-page reply brief (S. Ct. Dkt. #17) did Hoffman raise any constitutional question or in fact even mention the Constitution.

Only two questions were raised by Hoffman in his brief to the Supreme Court of Delaware. The first related to the type of intervention granted to him by the Court of Chancery. The second related to his contention that the record appeared to him to be insufficient to permit a proper determination as to the fairness and adequacy of the settle-

ment and sought remand for further consideration at hearings (Hoffman Brief, p. 2). On September 21, 1964, the Supreme Court heard oral argument on the appeals. Neither Hoffman nor his attorneys appeared. Attorneys for all other parties were present and argued orally before the court. In a comprehensive decision, the Supreme Court of Delaware unanimously affirmed the judgment of the Chancellor approving the settlement (Pet. A. 9-30). Petitions for reargument were thereafter denied (Pet. A. 31-32). Hoffman did not petition for reargument.

ARGUMENT

I

No constitutional question was set up or claimed by petitioner in the Delaware courts.

The jurisdiction of this Court to review the final judgment of the Supreme Court of Delaware in the first instance depends upon whether the petitioner "specially set up or claimed" any constitutional question and brought such claim and the grounds therefor to the attention of the Delaware courts with fair precision. *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67 (1928).

In *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897), this Court referred to the requirements of particularity in this respect, stating:

> "* * * the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In none of the papers filed by petitioner Hoffman in either the Court of Chancery or the Supreme Court of Dela-

ware, nor in his oral presentation to the Chancellor on his motion heard on February 24, 1964, did he even refer to the Constitution of the United States, or to the Fourteenth Amendment, or to any specific clause of the Fourteenth Amendment, or to any violation thereof by the Delaware courts. Petitioner Hoffman did not in the slightest apprise the Delaware courts that he was raising a federal question or that he was claiming any abridgment of rights under the Constitution of the United States. Therefore, the prerequisite to jurisdiction of this Court is lacking, and no jurisdiction attaches. *Herndon* v. *Georgia,* 295 U. S. 441, 442-3 (1935); *Harding* v. *Illinois,* 196 U. S. 78, 88 (1904); *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248 (1902); *Oxley Stave Co.* v. *Butler County, supra; Bowe* v. *Scott,* 233 U. S. 658, 664-5 (1914).

Petitioner states in his petition to this Court, at page 4, that the Supreme Court of Delaware in its decision completely ignored the Constitutional questions raised by him. The plain fact is that he raised none for the Supreme Court of Delaware to determine. *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309 (1903). Furthermore, petitioner did not apply to the Supreme Court of Delaware for reargument.

II

No federal question is raised by the petition herein.

It is submitted that both from jurisdictional and substantive aspects, no federal question is raised by the petition.

A. The Delaware Courts Followed Well-Established Judicial Procedures in the Cases at Bar in Full Compliance With the Requirements of Due Process of Law.

Under the first "question presented", petitioner asserts that failure to try the issues on the merits violated the due process of law clause of the Fourteenth Amendment.

This is patently unsound and is not the law of the land. On the contrary, the law favors the settlement of disputed claims. *Keller* v. *Wilson & Co.*, 194 Atl. 45, 47 (Del. Ch., 1937); *Winkelman* v. *General Motors Corp.*, 48 F. Supp. 490, 495 (S. D. N. Y., 1945). "The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues." *In re Prudence Co.*, 98 F. 2d 559, 560 (2nd Cir., 1938), cert. den. *sub nom. Stein* v. *McGrath*, 306 U. S. 636 (1939).

Rule 23(c) of the Federal Rules of Civil Procedure contemplates settlement of stockholders' derivative suits. Rule 23(c) provides for the judicial procedure to be followed on such settlements. The Court of Chancery of Delaware adopted the Federal Rules, and Rule 23(c) of the Rules of the Court of Chancery is substantially the same as Rule 23(c) of the Federal Rules (Vol. 13, Del. Code Ann., Court Rules). The Supreme Court of Delaware expressly stated that the Court of Chancery approved the settlement under Rule 23(c) (Pet. A. 26).

In the cases at bar, the Chancellor fully complied with Rule 23(c) and with all aspects of due process. A detailed Notice of Settlement, approved in form by the court, was mailed to all stockholders of Chrysler advising them of the proposed settlement and of their rights to object thereto, to undertake broad discovery, and to inspect all of the records on file (including exhibits and depositions), and to be heard at the settlement hearing at the specified date, time and place. As set forth in the Counter-Statement of Facts herein, the Chancellor afforded objectors the widest scope of discovery and call of witnesses at the hearings. The petitioner Hoffman had due notice and full opportunity to be heard. There was complete adherence by the Court of Chancery to the requirements of due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1877); *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246 (1943).

Petitioner cites *Chambers* v. *Baltimore & Ohio R.R. Company,* 207 U. S. 142 (1907) for the proposition that where a party is not given the right to litigate a claim on the merits in state courts, the privileges and immunities clause of the Fourteenth Amendment is abridged. The *Chambers* case does not hold any such proposition. In fact, this Court in *Chambers* upheld the Ohio courts in denying access to a citizen of any State (including Ohio) to its courts under a "wrongful death" statute, where the decedent was not a citizen of Ohio and the wrongful act causing death occurred in another State. The "equal treatment" clause of Article IV, section 2, paragraph 1, of the Constitution of the United States was involved in that case, not the Fourteenth Amendment.

Petitioner also cites *Prudential Insurance Company* v. *Cheek,* 259 U. S. 530 (1922), for a rule that where state courts deny a party the right to assert a claim or defense, such conduct constitutes deprivation of property without due process of law. No such rule is propounded in that case. This Court in *Prudential* upheld the constitutionality of a "Service Letter Act" as not being repugnant to the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment.

On the other hand, in *Perrine* v. *Pennroad Corporation,* 47 A. 2d 479, 486, 489 (Del. S. Ct., 1946), the Supreme Court of Delaware was explicit in its holding that in proceedings for the settlement of a stockholder's derivative suit, the Court of Chancery was not required to try the case on the merits, and that there was no violation of the Fourteenth Amendment by the lower court's refusal to admit all of the evidence offered by the objectors concerning the merits of the case.

B. The Petitioner, Having Been Afforded a Full Opportunity to be Heard at the Settlement Hearing and Neglecting to Avail Himself Thereof, May Not Claim That He Was Deprived of Any Constitutional Right by an Adverse Determination.

At the hearing on the petitioner's post-decision motion before the Chancellor, the following statements to the court by counsel are significant:

> "Mr. Corroon: * * * Now with respect to Mr. Bader's application, your Honor will recall that Mr. Bader attended one day of a hearing before your Honor and thereafter never saw fit to set foot in this court until today. He had the opportunity to participate in the rather lengthy hearings that were held last May. He did not see fit to do so. The matters that Mr. Dann refers to, many, many of them are matters that were covered by the allegations of the complaint, and Mr. Bader was able, if he had so wished, to cross-examine the witnesses that we put on the stand last May. He was so little interested in the matter that he never showed up. * * * " (A451-452)
>
> * * *
>
> "Mr. Bader: May it please your Honor, I would just like to say one thing in respect to what Mr. Corron said about my appearances at the various hearings. Of course, Mr. Corroon is absolutely correct in what he stated. * * * " (A457)

Under the broad discovery granted by the Chancellor to objectors, the petitioner had the right to examine fully into the fairness and propriety of the settlement, to interrogate witnesses both before and during the settlement hearing, and to inspect all of the Dann documents. Other objectors availed themselves of these rights. Nothing of any substance was raised after decision that had not been in issue before the Chancellor prior to the decision (A452-459).

Our jurisprudence does not permit a party to frustrate the forward progress of judicial process by sleeping on his rights and after determination to awaken and seek to undo all that has transpired. Neglecting to avail himself of his rights, the petitioner may not now claim that he was deprived of any constitutional right. *Southern Ry. Co.* v. *Durham*, 266 U. S. 178 (1924); *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, 1 N. E. 2d 220 (1935); *Narragansett Amusement Co.* v. *Riverside Park Amusement Co.*, 260 Mass. 265, 157 N. E. 532, 535 (1927). The due process of law clause does not guarantee more than one hearing before judgment at which to be heard and present evidence. Petitioner had that hearing and opportunity before the Chancellor. *Southern Ry. Co.* v. *Durham, supra; Brein* v. *Conn. Eclectic Examining Board*, 103 Conn. 65 130 Atl. 289, 295 (1925), error dismissed for want of jurisdiction, *sub nom. Brein* v. *State Dept. of Health*, 273 U. S. 640 (1926); *Black* v. *York*, 300 Ky. 166, 189 S. W. 2d 599, 600 (1945).

C. The Court of Chancery Made a Thorough Inquiry Into the Fairness and Propriety of the Proposed Settlement Under Applicable Delaware Law; and There is Ample Support in the Record for the Approval Thereof by the Delaware Courts.

The statements in the petition that the Delaware courts did not consider the good faith aspect of the settlement is not true. As set forth in the Counter-Statement of Facts in this brief, the Chancellor's approach to the procedures to be followed in the settlement hearing was designed to make certain that the settlement was arrived at in good faith. The Chancellor had occasion on petitioner's post-decision motion to make this point clear:

> "All I can say is that feeling as I do, a great responsibility to see that the settlement is only approved if it is fair and in good faith, I have found nothing in the matters presented to me which would justify further hearings or modification of this settlement." (A458-9)

Moreover, the petitioner totally ignores the fact that the Gallo plaintiffs and their counsel were an independent force in the settlement negotiations, entirely separate and apart from the Dann plaintiffs and their counsel (A454-7). The record contains no charge of any nature from any source, including Dann himself, that the Gallo plaintiffs and their counsel did not negotiate in good faith or that their conclusion as to the fairness of the settlement was not an independent exercise of their own judgment (A455-7). This was also recognized by the Chancellor in his decision approving the settlement (Gallo A37).

The petitioner cites, at page 7 of his petition, three decisions of this Court, namely, *American United Mutual Life Insurance Co.* v. *City of Avon Park,* 311 U. S. 138 (1940); *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587 (1875); and *Strong* v. *Repide,* 213 U. S. 419 (1909), for what he asserts are holdings by this Court that failure of a court to investigate any possibility of fraud in connection with the settlement of stockholders' derivative actions constitutes a violation of Constitutional provisions. That is plainly a misstatement of the holdings in those cases. The Constitution of the United States is not even referred to in any of those decisions. None of the three cases involved a stockholders' derivative action.

American United involved the applicability of provisions of Chapter IX of the Bankruptcy Act to a plan of composition. *Twin-Lick* involved an appeal to this Court from the Supreme Court of the District of Columbia on general substantive law only. This Court affirmed a decree in favor of the defendant, upon a holding that there had been no breach of fiduciary duty or concealment in the sale of property. *Strong* similarly involved substantive law only on an appeal to this Court from the Supreme Court of the Philippine Islands. In applying Philippine law, this Court concluded that the sale of stock there involved in private litigation was fraudulent.

Petitioner asserts, at page 7 of his petition, that the cases of *Feldman* v. *Pennroad Corp.*, 155 F. 2d 773 (3rd Cir., 1946); *Perrine* v. *Pennroad Corp., supra,* 47 A. 2d 479 (Del. S. Ct., 1946); *Braun* v. *Fleming-Hall Tobacco Co.*, 92 A. 2d 302 (S. Ct., Del., 1952); and *Karasik* v. *Pacific Eastern Corp.*, 180 Atl. 601 (Del. Ch., 1935), follow the same rule which he ascribed to the three cases of this Court discussed above. Actually, these four latter cases, so far as pertinent, set forth the law of Delaware in its application to the settlement of stockholders' derivative suits. That law in part provides that the Delaware courts will set aside a proposed settlement if negotiated in bad faith. No constitutional question was involved in any of the four cases in that respect.

Significantly, however, the federal court in *Feldman* dismissed a complaint in which a stockholder sought to enjoin Pennroad from consummating the proposed settlement of a stockholders' derivative suit and to appoint a receiver to prosecute all claims in its behalf. The settlement of that suit had been approved by the Court of Chancery and the approval affirmed by the Supreme Court of Delaware in *Perrine* v. *Pennroad, supra.* The particular stockholder had appeared as an objector in the settlement hearing before the Court of Chancery. The federal court held in *Feldman* that the plaintiff was estopped from further disputing the settlement.

In *Braun*, the conduct of the objector is analogous to that of the petitioner in the case at bar. Braun had been afforded the opportunity at the settlement hearing to examine principal witnesses, to take depositions of any witness and to take any other steps toward controverting the proposed settlement. He did not avail himself of the opportunity. Braun urged what would have been tantamount to a trial of the action. In rejecting Braun's position, the Supreme Court of Delaware pertinently stated:

> "One of the considerations which anciently caused the law to favor objects designed to put an end to

> litigation was the saving of time, expense, and inconvenience incident to trial. * * * Since Braun's counsel did nothing to take advantage of that opportunity, it would have been an unwarranted imposition upon all of the parties if the Chancellor had acceded to the demand that he require what would be tantamount to the very trial which this settlement was designed to avoid" (92 A. 2d, pp. 309-10).

Finally, petitioner cites the dissenting opinion in *Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir., 1953). However, aside from the irrelevancy here of that opinion, the majority of the court there affirmed approval of the settlement; and this Court denied certiorari, 346 U. S. 832 (1953).

It is apparent that petitioner is actually seeking to have this Court review the application of Delaware law by the Delaware courts. This Court in numerous decisions has held that it will not review State law absent a federal question, even if the state courts have erred in the application of their own law, which surely is not the case in the matter at bar. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157 (1917); *Arrowsmith* v. *Harmoning*, 118 U. S. 194 (1886); *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389 (1896).

The approval of the settlement by the Delaware courts is overwhelmingly supported by the record. The benefits flowing to the stockholders of Chrysler from the modified Incentive Compensation Plan are substantial, as indicated in the decision of the Supreme Court of Delaware (Pet. A21-24). One aspect of the modified Plan alone secures benefits to the stockholders that are huge. In this respect, actual figures for 1963 show that the stockholders' set-aside increased for that year under the new formula by $39,199,107 more than under the old formula on a before-tax basis and by $19,850,428 on an after-tax basis (A267-269; A279). Moreover, the new formula establishes a real task and a real incentive for the covered employees and at the

same time assures the stockholders that upon any payment under the Plan, they will have secured a substantial relative increase in their investment (A105-6; 132-3; 143; 156). In petitioner's brief to the Supreme Court of Delaware, at page 4, he significantly asserted that he "did not challenge the incentive compensation plan modification."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari of the petitioner Arthur Hoffman should be denied.

Respectfully submitted,

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APPENDIX TO BRIEF OF GALLO RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY PETITIONER ARTHUR HOFFMAN

Decisions of the Court of Chancery of Delaware

SEITZ, Chancellor:

This is the decision after hearing on the fairness of a proposed settlement of two derivative actions.

The first action was commenced by one Sol A. Dann and other stockholders against Chrysler Corporation ("Chrysler"), various directors and officers as well as certain suppliers of Chrysler. This action will be referred to as the "Dann action".

The Dann action was commenced in August 1960, and involved some twelve causes of action. After certain pleading skirmishes (See Dann v. Chrysler Corp., Del. Ch., 166 A. 2d 431, 174 A. 2d 696), a consolidated amended complaint was filed consisting of some 109 pages embracing fifteen causes of action and about sixty separate claims. Certain of the defendants thereafter served their renewed motions to dismiss or in the alternative for a more definite statement. The so-called Keller defendants served their motion to dismiss or for summary judgment. The defendant John W. Minor and the defendant NAFI Corporation (the only appearing supplier) filed answers denying the charges asserted against them. The defendant Robert P. Laughna filed a motion to strike and to dismiss parts of the complaint.

All the motions to dismiss were based largely on the contention that the plaintiffs could not amend their complaint so as to assert new causes of action as to those non-resident defendants who had appeared generally following the sequestration of their property. Certain motions also questioned whether the allegations were set forth with

sufficient particularity. The Keller defendants raised the defense of statute of limitations.

In February 1962, Mary and James Gallo filed a derivative action against Chrysler and the then directors and certain past officers of Chrysler charging many of the same acts, omissions, and "frauds" as were alleged in the Dann complaint.

In June 1962, this court entered an order consolidating the Dann and Gallo actions solely for the purpose of discussing a possible settlement. The time fixed was subsequently extended at the request of the parties.

In the meantime (between 1960 and March 1963), four stockholder actions were commenced outside the State of Delaware embracing some of the same causes of action—two in the New York Supreme Court, one in the Federal District Court for the Southern District of New York and one in the Federal District Court for the Eastern District of Michigan. Also, Chrysler commenced a libel action against Dann in the Delaware Superior Court.

On March 6, 1963, a stipulation of settlement was filed. To facilitate the settlement a final amendment was filed by the Dann plaintiffs adding two additional causes of action which, it is suggested, incorporate the additional charges found in the New York and Michigan actions. The stipulation of settlement provides, inter alia, that all the derivative actions shall be dismissed with prejudice against all the defendants except the defendant W. C. Newberg. As to Newberg the dismissal will be without prejudice. Such fees and disbursements as the court may allow to plaintiffs shall be paid by Chrysler.

Under the terms of the stipulation of settlement, if approved, each of the individual defendants who is a party to the stipulation and all past or present directors of Chrysler, except the defendant Newberg, will receive a

release discharging each of them from any and all claims arising out of the matters alleged in the complaint and all amendments thereto both in the actions brought in this court and the "companion" actions in the New York state and federal courts. Also, the individual defendants who are parties to the stipulation will seek indemnity for their attorneys' fees incurred in connection with these actions.

On March 6, 1963, a court-approved notice of hearing on the stipulation of settlement was mailed to all stockholders. A proxy statement was simultaneously transmitted to the stockholders proposing the adoption of a modification in Chrysler's incentive compensation plan. The following language is contained therein:

> "Since the modification of the formula for computing the total provision that may be made for incentive compensation awards is a principal term of settlement and is necessary if the settlement is to be put into effect, a vote in favor of amending the 1956 stockholders' resolution to change the incentive compensation formula will, in effect, be a vote in favor of the settlement."

At a special meeting of the stockholders held on April 16, 1963, out of a total of 9,083,502 shares outstanding and entitled to vote, 6,699,016 shares were voted in favor of and 144,240 against the proposed modification.

The court also appointed an amicus to report, inter alia on "What appear to be the issues relevant to the hearing on the proposed settlement and the proof which might be of assistance to the court." This elaborate and helpful report was filed and was made available to all interested parties before the hearing. In particular, it discussed and analyzed the evidence of record relevant to the various issues and suggested other areas which might need elaboration.

Several stockholders filed objections, and the matter was tried at some length. The objecting stockholders are identified collectively herein as "objectors", unless more particular identification is desirable.

This is the decision on the "fairness of the settlement" after hearing and elaborate briefing.

Before the specific issues are considered, a little background is in order. Chrysler, a Delaware corporation, employs directly or through its subsidiaries in the United States approximately 77,000 people. It manufactures and sells passenger automobiles and commercial cars and trucks both here and abroad. It is the third largest manufacturer of such vehicles in the United States. It also manufactures assorted products of some substance including defense materials.

I turn now to the terms of the settlement and their relationship to the causes asserted.

The "consideration" offered in exchange for the releases and dismissal of the causes of action is a modification of Chrysler's present incentive compensation plan for its employees. The details of the present plan and the proposed changes are discussed more fully later herein. The Dann plaintiffs' attorneys also urge that the changes in Chrysler's management personnel (referred to later herein as a "change in management") which occurred both prior to and during the pendency of these suits, are attributable to the activities of the plaintiffs or their attorneys. They contend that such changes effectuated one of the principal purposes of the litigation and that they provide in and of themselves a sufficient basis for approving the settlement.

The proponents agreed that the stipulation of settlement and the proposed modification of the present incentive compensation plan should not become operative until the modification was approved by Chrysler's board and by its stockholders and final approval of the settlement was

granted by this court. Final settlement was also conditioned upon dismissal of the lawsuit instituted by Dann in the Federal District Court in Michigan against Chrysler and the giving of mutual releases between Dann and Chrysler of claims and counterclaims involved in the libel action filed by Chrysler against Dann in the Superior Court in Delaware plus the payment of $20,000 and disbursements to Dann's separate counsel therein.

In the stipulation all the named defendants (except Newberg) deny liability under any of the causes of action but agree that the expense of further litigation and the probable expenditure of time on the part of Chrysler's employees, officers ,and directors make it desirable that the litigation be terminated without further proceedings. Plaintiffs state that the "significant and steady progress in all phases of Chrysler's operations under new management * * * with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan" can be considered an achievement of the objectives of the litigation. Thus, they state that they believe that settlement on the proposed terms is much to be preferred to continuation of the litigation and is in the best interests of Chrysler and its stockholders.

In the court-ordered notice of hearing which was sent to the stockholders, plaintiffs' attorneys made certain representations with respect to plaintiffs' ability to recover on the alleged causes of action. These causes of action were divided by them into three categories: "(1) charges that certain past and present directors and/or officers of Chrysler have been financially interested in Chrysler suppliers and have personally profited from transactions between Chrysler and suppliers; (2) charges of mismanagement by defendants as directors and officers of Chrysler during the years 1956 to 1961; and (3) charges relating to the Incentive Compensation and Stock Option plans of

Chrysler including allegations that they were not soundly devised and provided rewards out of proportion to the performance required to gain the rewards and should be appropriately revised."

Plaintiffs' attorneys further stated in the notice that while they felt that inquiry into the alleged instances of wrongdoing was warranted, they had concluded that the evidence gathered did not sustain the charges of personal interest and personal profits on the part of the defendants, except in a few instances discussed in the notice, and would not permit successful prosecution of the charges. Next, plaintiffs' attorneys acknowledged that the charges of mismanagement against the named defendants lay primarily in the area of business judgment and that the burden of proving culpability was too great to promise success in the prosecution of such charges.

Plaintiff's attorneys stated finally that they believed their complaint concerning the "fairness" of the incentive compensation plan was well grounded and that a revision in such plan in accordance with their suggestions should be made. The revision or modification negotiated by plaintiffs' attorneys with the directors of Chrysler is said to meet these "suggestions" in that no compensation may be awarded under the new plan until higher earnings are achieved by the corporation but a higher rate of participation is permitted once these higher levels of earnings are achieved. As to the stock option plan, plaintiffs' attorneys noted that the directors of Chrysler had already made certain changes therein.

The proponents of the settlement all contend that the agreed terms are fair and beneficial to Chrysler and ought to receive the approval of the court. The defendants, however, deny that the change in Chrysler's management and the "changes and improvements in Chrysler which have occurred subsequent to commencement of the activities of

plaintiffs'' are, as contended by plaintiffs' attorneys, attributable to the plaintiffs.

The objectors who have formally appeared herein take the position that the court should refuse to approve the proposed settlement on the ground that it is ''unfair'' to Chrysler's stockholders. The heart of their contention is that in practical effect Chrysler will receive nothing of tangible benefit as a result of the settlement, and indeed may be giving up a present advantage, while in return it will be required to deliver a release from all further liability to each of the named individual defendants except Newberg. Except for the objector Ezzes (and perhaps Koenigsberg as later considered), the objectors do not urge that there is in fact merit in any of the causes of action set forth in the amended complaints sufficient to permit a recovery thereon. Thus, they do not suggest that the ''consideration'' offered in return for the releases is ''inadequate''. Rather they contend that the proposed modification of the incentive compensation plan is merely a device agreed upon by the proponents by which the defendants may avoid what plaintiffs' attorneys are said virtually to concede are worthless claims. Thus, in the view of the objectors, the proposed settlement will have the effect, inter alia, of committing the corporation to a radical change in its incentive compensation arrangement, such change having resulted not from an untrammelled exercise of discretion on the part of the directors and stockholders but from the necessity of finding a basis for settling the lawsuit.

A further and separate objection they say is the fact that the proposed modification of the incentive compensation plan, if instituted, will result in the authorization of greater dollar payments to Chrysler's employees under such plan than are presently permitted. Thus, they contend, no ''benefit'' can assuredly be said to pass to Chrysler as a result of the proposed settlement beyond the termina-

tion of the existing lawsuits with the consequent elimination of expense and unfavorable publicity and an end to the distraction of Chrysler personnel from their corporate duties.

Parenthetically, defendants' attorneys meet these objections to the settlement head on. They of course agree that the claims are worthless, and they concede that the modification of the incentive compensation plan if approved will authorize larger payments to Chrysler executives, a number of whom are defendants herein, if the requisite earnings exist. They admit that Chrysler's directors were anxious to terminate the litigation in order to avoid further expense and embarrassment to the corporation and "were willing to consider any honorable and proper way to get these suits out of the way".

They contend, however, that as a practical matter the corporation has nothing to gain from a continuation of the litigation and that it faces the prospect of further losses in time, good will, and expense. They urge that the modified incentive compensation plan will be an improvement over the old plan, since net earnings will have to be higher before the beneficiaries become entitled to the same dollar amounts of compensation as they would have been under the existing plan.

The defendants consider immaterial the fact that a number of them will be in a position to receive a greater dollar amount of incentive compensation for the year 1963 under the proposed plan than under the old plan. This they say is the result of Chrysler's financial success in the 1963 fiscal year and merely fulfills the purpose of the modified plan to give greater rewards for greater corporate success. They emphasize the fact that the stockholders as well as the directors approved the modification after being explicitly informed that approval was a vote in favor of the proposed settlement. Defendants' attorneys urge that even if there is doubt that the modified incentive com-

pensation plan is better than the old plan, still the court should approve the settlement since the interests of Chrysler can best be served by terminating the litigation.

Should the court approve the settlement on the basis of the terms agreed upon by the proponents and approved in effect by the holders of a vast majority of the stock by virtue of their affirmative vote on the modification of the existing incentive compensation plan?

I should note preliminarily that the objecter Ezzes charges that the 1963 proxy statement was tainted with fraud. This charge is based on the claim that the statement did not adequately or fully describe the nature of the claims and the effect of the proposed settlement. I find no merit to these charges.

Unlike the other objectors, Ezzes alone claims that there is in fact merit in many of the causes of action asserted in the Dann and Gallo complaints. He contends that the proposed settlement should not be approved by the court, because the consideration offered by the defendants in exchange for releases is wholly inadequate in view of the potential recovery by the corporation.

Before dealing with specific objections it would seem desirable to mention the record which is used as the basis for deciding this matter. The plaintiffs agreed to the terms of the settlement on the condition that they be permitted to have reasonable discovery so as to make a judgment as to whether the other claims had sufficient merit to negate the fairness of the proposed settlement. Rather elaborate discovery was undertaken. It resulted in the representation by plaintiffs in the notice to stockholders of the proposed settlement that except for the incentive compensation plan cause of action the other causes could not be successfully pursued. It is obvious, with all due regard for the integrity of counsel, that the approach taken is, at a minimum, subject to the possibility of real abuse. The court took this into consideration in passing upon

the objectors' requests for further discovery. In addition the court gave counsel for the various objectors an opportunity at the hearing to interrogate certain of the knowledgeable defendants and other witnesses whom the court required to appear for the purpose of testifying to a number of these matters. I have concluded that the record is sufficient for present purposes.

The objector Ezzes claims that a number of the causes of action have merit. He so contends with respect to alleged frauds on the part of Chrysler's management in administering Chrysler's incentive compensation plan. Strictly speaking, a number of these allegedly valid claims do not fall within the confines of the incentive compensation causes of action asserted in the Dann and Gallo complaints. The notice to the stockholders of the hearing on the settlement contains the following language:

> "In plaintiffs' discovery proceedings herein, the documents relating to the incentive compensation plan were marked as exhibits. In view of their examination into their charges against individual officers and employees of Chrysler, plaintiffs' attorneys have concluded that although there is an issue as to fairness of the existing plan, there was no invalidity in its adoption, or impropriety in the application of or calculations under the plan or any improper award of benefits thereunder except for any possible claim that Chrysler may have against Newberg. Pursuant to the stipulation of settlement of these actions, a modification of the plan as hereinafter more fully described, negotiated by plaintiffs' attorneys, will be submitted for stockholder approval."

I propose to resolve any doubt by treating each of the allegedly valid causes of action asserted by the objector as if they fell within the confines of the allegations of the

complaints. I note in passing that of all the claims originally asserted by the plaintiffs only the issue as to the "fairness" of the existing (1956) plan is said to have merit in connection with the defendants who join in the settlement proposal. I observe further that nowhere in the notice to stockholders or in plaintiffs' briefs is the precise nature of the alleged unfairness in the plan spelled out.

Three of the Ezzes objections are directed toward allegedly improper practices under the 1929 Chrysler incentive compensation plan and the allegedly fraudulent adoption of the 1956 plan.

The history of Chrysler's incentive compensation plan, commencing in 1929, forms the background for these contentions of the objector. On April 16, 1929, Chrysler stockholders authorized the payment of incentive compensation in the following language:

> "This corporation may incur obligations on account of such profit sharing plans and bonus plans, provided said expenditures for any calendar year * * * shall not exceed for said year six and one half percent (6½%) [1] of the *net earnings of the Corporation for that year* * * *." (Emphasis added)

Computation of incentive compensation for the period 1929 to 1955 was governed by the 1929 resolution set out above, which provides for the application of a percentage figure to the "net earnings of the Corporation". The proponents of the settlement concede that from 1929 to 1939 the "net earnings" against which the percentage was applied was a consolidation of the earnings of Chrysler and all wholly-owned subsidiaries, domestic, Canadian and foreign. From 1940 to 1953, however, Canadian and other foreign subsidiaries were not consolidated for incentive

[1] By resolution of the Board of Directors adopted February 23, 1941, this percentage was reduced to five per cent.

compensation purposes. Beginning in 1954, Canadian and foreign subsidiaries were once against consolidated. A comprehensive revision of existing incentive compensation plans was effected by the stockholders' resolution of April 17, 1956, which remains in force at the present time. The pertinent language of that resolution follows:

> "* * * this Corporation may incur obligations on account of Incentive Plans, provided the provision out of earnings for any fiscal year of the Corporation for all Incentive Plans then in effect * * * shall not exceed five per cent (5%) (as computed by the independent Auditors of the Corporation) of the *Consolidated Net Earnings for that fiscal year (as reported in the Annual Report to the stockholders) of the Corporation and such of its subsidiaries as are consolidated in its annual statements* * * *". (emphasis added)

The Ezzes objections on these matters are first that during the period 1929-1955, payments of incentive compensation were based on computations of consolidated net earnings when in fact they should have been based on the net earnings of Chrysler alone; next, that the 1956 stockholders' resolution relating to incentive compensation "changed" the basis for payments of such compensation to consolidated net earnings though the proxy statement failed to reveal that the 1929 formula did not permit consolidation; and finally, that during the period the 1929 formula was in force, the method of computation was improperly altered from time to time.

The defendants' answer to these objections is that the 1956 stockholders' resolution, as indicated in the proxy statement, merely restated the practices that had been adopted under the 1929 resolution and did not fundamentally change them although funded debt was added to

the capital base. Thus, the following statement is found in the 1956 proxy statement: "The proposed amendment generally revises the resolution of 1929 so as to eliminate what has become obsolete and to adapt the language to present-day accounting terminology". The defendants point out that the consolidation of wholly-owned subsidiaries for incentive compensation purposes, which is expressly authorized by the 1956 resolution, had always been Chrysler's practice though the 1929 formula only refers to "net earnings of the Corporation". Also, the earnings figures which have been used for incentive compensation purposes have been those shown in the annual reports to stockholders, though no reference is made in the 1929 resolution to annual reports of earnings.

The defendants say that foreign subsidiaries were not included in the consolidated financial statements in the annual reports to stockholders for the years 1940 through 1953, because of exchange restrictions and war-time conditions in foreign countries. They contend that this situation was explained to the stockholders in the annual report for the year 1940, although that report is not part of the hearing record. Thus, they urge that the practice of basing compensation on the financial statements appearing in the annual reports to stockholders was consistently followed throughout the period 1929 to 1955.

What assessment may be made of these supposed causes of action said to exist against some of the defendants herein? The court's responsibility at this stage is merely to evaluate the probability of success if these issues were ultimately litigated and not to make a final determination. Krinsky v. Helfand, 38 Del. Ch. 553, 156 A. 2d 90.

Turning then to the above contentions of the objector Ezzes, I am satisfied that the likelihood of success on any of these claims is very small. The defenses of laches or limitations might well be applicable to each of these claims. Moreover, assuming that Chrysler reported its earnings to

its stockholders on a consolidated basis prior to the institution of the 1929 plan, no valid objection could probably be raised to the interpretation of the language of the 1929 formula adopted by the persons charged with implementing such plan. A very similar situation is presented in Meyers v. Cowdin, Sup., 47 N. Y. S. 2d 471, where the New York court in dismissing the complaint after trial noted that the earnings of the corporation there involved had always been reported to the stockholders on a consolidated basis. It concluded therefore that payments of incentive compensation based on such consolidated earnings were not improper though the formula provided for payments based on "net earnings of the Company".

Next, I think that the objector's claim that the stockholders' resolution of 1956 was induced by fraud is without substance. It is conceded that incentive payments for the period 1929 to 1955 were based on the consolidated earnings of Chrysler and its wholly-owned subsidiaries as reported to the stockholders. It follows therefore that there was no misrepresentation or inadequate disclosure when the 1956 proxy statement stated that the purpose of the revision, which I find made no change of any real substance in the existing plan, was "to adapt the language to present-day accounting terminology".

Next, I turn to the objector's claim that the persons charged with implementing the plan improperly altered computation practices without regard for the language of the various stockholders' resolutions. I note first in evaluating this claim that there is no showing that the corporation or its stockholders were damaged by any of these alleged alterations.

The objector points principally to the exclusion of Chrysler's wholly-owned foreign subsidiaries from consolidated earnings during the period 1940 to 1953. The defendants claim, however, that the practice of excluding such subsidiaries and the reasons therefor were explained

to the stockholders in the 1940 annual report and that such information was filed with the S. E. C. I am satisfied that little success could be anticipated if this issue were litigated, since payments during this period were admittedly based on consolidated net earnings as reported in the annual reports to stockholders. There is no showing whatever that the alteration in the method of consolidation violated sound accounting principles, nor does the objector refute defendants' assertion that the allegedly improper alteration was fully disclosed to the stockholders.

The objector claims that there were other improper alterations in computation practices with respect to wholly-owned retail selling and leasing subsidiaries and so-called forfeitures. These claims appear to be wholly without merit. I merely note in passing, first, that the allegedly improper treatment accorded forfeitures served to reduce rather than increase the fund available for incentive compensation and, next, that the earnings of the selling and leasing subsidiaries were consolidated, in effect, with the earnings of the other subsidiaries in the annual reports to stockholders.

The objector Ezzes next complains that payments in 1955, 1957, 1960, and 1962 were improper because the language of the plan was misinterpreted so as to inflate the fund available for incentive compensation payments. The first matter under this head concerns the inclusion of state and local income taxes in 1962 as part of the fund from which "set aside" was deducted. The 1956 plan expressly permits the inclusion of "taxes on income". The objector contends, however, that the 1929 plan only permitted the inclusion of *federal* taxes on income and that the 1956 proxy statement implied the 1956 plan would continue on the same basis.

There are several reasons why in my opinion the probability of success on this issue is small. First, there is nothing in the 1956 proxy statement that can be said to consti-

tute a representation that the phrase "taxes on income" in the 1956 plan was to have the same meaning as "Federal taxes" in the 1929 plan. The most that may be said is that the amended language introduced a potential ambiguity in view of the former practice. Certainly this was an area where those in charge of implementing the plan were entitled to exercise their sound discretion. Also, I note that in November 1962, inquiry with respect to the proper interpretation of the language of the plan was directed to legal counsel by Chrysler's auditors. In reply, it was specifically stated that the language here in issue included state and local as well as federal income taxes. Thus, considering the factors relevant to the proper interpretation of this language, I think the likelihood of recovery from any of the defendants of the alleged overpayments for the year 1962 would be remote.

The objector next raises objection to the interpretations of certain portions of the plan which are found in the reply by legal counsel to Chrysler's auditors. I pause here merely to note that the objector disagrees with such interpretations. However, he does not point to any specific instance where payments were based on these allegedly erroneous interpretations of the plan. Thus, assuming that he were correct, there is nothing on which a recovery by the corporation could be based. I add, however, in order to avoid clouding this issue, that the interpretation placed on the language in issue by counsel seems fair and reasonable. I conclude therefore that prosecution of this claim would probably be fruitless.

The objector claims that the 1956 plan is invalid: (1) because incentive compensation can be based on non-operating income, (2) because loss years are not averaged with profitable years, (3) because the compensation percentage is applied to before-tax rather than after-tax earnings, and (4) because compensation is based on net earnings as reported to stockholders rather than net earn-

ings as reported to the federal government for tax purposes. I can only say that no authority is cited which suggests that any one of these reasons per se renders the incentive compensation plan invalid. At bottom, these objections are directed to the form of plan which the directors and stockholders voted to adopt. It may well be that some plan other than the one adopted would better accomplish the objectives of an incentive plan. But that of course is not for this court to say. I am satisfied that the contentions of the objector under this head offer no legal basis for attacking the 1956 plan.

The objector Ezzes also contends that all stock options issued after 1956 were invalidly issued in violation of the stockholders' resolution of April 17, 1956. I think it clear that the limitations placed in the resolution authorizing payments under "Incentive Plans" have no bearing on the issuance of stock options and that such options were not invalidly issued. While a stock option plan may indeed be considered an incentive plan, it is readily apparent that the term "Incentive Plans" appearing in the 1956 proxy statement and stockholders' resolution was not intended to and did not refer to the Chrysler Stock Option Plan.

Next, the objector claims that the cancellation of certain options in 1958 and 1959 and their reissuance at lower option prices constituted a waste of assets for which the recipients are liable. The 1959 proxy statement makes it clear that the granting of the new options, conditioned upon surrender of the old, was undertaken by the Stock Option Committee of Chrysler which was composed of directors not eligible to receive options. Each of these new options could be exercised by the holder only if he remained continuously in the employ of Chrysler or its subsidiaries for at least eighteen months after the date of its grant. The action of the Stock Option Committee was approved by the Board of Directors and by the stockholders.

The objector contends that the reissuance of stock options at lower prices constitutes a gift or waste of assets, since the committee action was taken only when it was made clear that there would be a net loss in earnings during 1958 thereby depriving certain of the defendants of incentive compensation for 1958. He also contends, citing certain magazine and law review articles, that the reissuance of stock options at lower prices ought not be permitted, since such action in effect excuses poor corporate performance.

A number of Delaware decisions I think support the view that where stock options are granted by a disinterested committee with the approval of the directors and stockholders and where the optionee is required to remain in the employ of the corporation for an extended period of time, no legal attack may successfully be made upon such options. See, e.g., Gottlieb v. Heyden Chemical Corporation, 33 Del. Ch. 177, 91 A. 2d 57; Beard v. Elster, (Del. Ch.). 160 A. 2d 731. One may have difficulty reconciling the practice of reissuing options at lower prices with the "incentive" aspect of the earlier grants. Nevertheless, the court would not be inclined to block reasonable corporate action in this area, particularly in view of the need of corporations to retain talented personnel.

I conclude therefore that the probability of success if this issue were ultimately litigated would under the circumstances be small.

The objector next attacks the "revolving credit agreement" negotiated by Chrysler with a number of banks whereby Chrysler was extended a credit commitment of $150,000,000. The commitment was obtained on June 12, 1958 and was continued until May 15, 1961. Although Chrysler never used the revolving credit, it nevertheless paid the sum of $2,157,553 to the participating banks during the period the commitment remained in effect.

The objector contends that six members of the nine-member Finance Committee that recommended the commitment were officers and directors of participating banks. All the members were present on June 12, 1958 when the matter was voted upon, and all voted except R. E. McNeill, Jr., President of the Hanover Bank, who had been the primary negotiator of the transaction. The Board of Directors of Chrysler voted upon the commitment at its meeting held the same day. Eighteen of the twenty-one directors were present. Of these eighteen, eight were associated with banks ultimately participating, and all voted except McNeill who nevertheless was present.

Article II, Section 9 of Chrysler's By-Laws provides that no director shall vote at a meeting of the Board on a question in which he is interested (with certain exceptions not relevant here) or be present while the same is being considered. Section 9 goes on to apply the same safeguards where a transaction between Chrysler and another corporation is involved and a director of Chrysler is a director or officer of such other corporation. The same limitation appears to be applicable to action taken by any committee of the corporation.

The objector contends that the presence of the interested directors at the meetings of the Finance Committee and the Board violated Section 9 of the By-Laws. He claims that by virtue of his position on the Stock Option Committee and Incentive Compensation Committee, McNeill had a "persuasive effect" on the other directors in obtaining their approval of the commitment. Next, he claims that Chrysler's undertaking was reckless and without diligence, since admittedly there were no studies on the subject of the revolving credit agreement before the Finance Committee or the Board at the time it was approved or while it remained in effect, though Chrysler never used the credit but continued paying for the availability of such credit. The objector seems to suggest that even if the initial credit

agreement in 1958 was warranted by the circumstances then prevailing, the subsequent improvement in Chrysler's Cash and Marketable Securities and Net Current Assets required reconsideration on the part of the Board. The objector attributes all these alleged wrongs resulting in payments by Chrysler of $2,157,533 over a three-year period to the conflict-of-interest situation in which certain of the directors found themselves.

The revolving credit agreement was the subject of the ninth Dann cause of action and the sixth Gallo cause of action. Much of the evidence relied upon by Ezzes in voicing his objection to the settlement of this claim was originally produced by the plaintiffs. In the notice to stockholders plaintiffs' attorneys summarized the claim and made the following statement:

> "Upon all the evidence plaintiffs' attorneys have concluded that the credit arrangement was fair and reasonable. Apart from the question whether a technical by-law violation might still be argued, plaintiffs' attorneys have concluded that these causes of action could not be sustained in the light of business considerations and the fact that there is no evidence that any director personally profited from the transaction."

In evaluating the prospects of success on this claim I assume without deciding that Section 9 of Chrysler's by-laws was violated by the fact that a number of "interested" directors were present and voted to approve the agreement. Does it follow that the directors involved are therefore liable for the amount expended by Chrysler for the availability of the credit? It is uncontradicted that Chrysler paid no more than the going rate for the commitment. Indeed, there is no "objective" evidence that the terms were unfair to Chrysler or that the participating directors were

guilty of bad faith. The thrust of the Ezzes objection is that the interlocking directors, because of their conflict of interest, recklessly committed Chrysler to a credit commitment which it did not really need. I am of the opinion, however, that the evidence of record on this matter fully supports the view, even on the assumption that the defendants must bear the burden of proof, that the commitment was reasonably necessary for the purpose that it was intended to serve and that the need therefor was reviewed periodically and reaffirmed. Considering the background and experience of the members of Chrysler's board as well as the other evidence, I do not think the absence of written studies is indicative of a lack of diligence on the part of the directors in approving the commitment or allowing it to continue. Thus, apart from the alleged by-law violation, I am satisfied that the defendants could successfully have vindicated their conduct.

What then is the legal effect of the violation of Section 9 of the By-Laws? Certainly such conduct gives just cause for apprehension, but it does not follow in my opinion that the defendants are therefore absolutely liable for the dollar amounts paid by Chrysler for the commitment. None of the defendant directors received any personal profit from the transaction, nor did Chrysler receive less than its "money's worth". It follows therefore that any sum these defendants are required to pay to Chrysler will be in the nature of punitive, as opposed to compensatory, damages.

There are instances where the court will impose such damages in order to vindicate a legislative or other public policy. Generally speaking, however, in the absence of fraud or bad faith, a court will not upset a transaction involving corporations having even a majority of directors in common where the transaction is shown to be fair. In the present case, less than a majority of the directors were associated with banks ultimately participating, and one

cannot fairly say that undue influence was exerted as to the rest. I recognize that the utmost vigilance is required in a case such as this, but where a close scrutiny of the record fails to disclose any meaningful evidence of actual wrongdoing or damage to the corporation, the monetary worth of the claim is most dubious. I conclude from the foregoing that plaintiffs' attorneys were justified in stating that these causes of action could not be sustained.

I turn next to the objector's claim that the directors of Chrysler acted recklessly in purchasing a substantial minority interest in Simca prior to 1963. The objector does not contend that there was any conflict of interest involved in this transaction. Thus, in substance he is attacking a decision involving a business judgment on the part of the directors. I am satisfied from the record before the court that the evidence adduced in support of such claim is wholly inadequate to afford any hope of meeting the heavy legal burden imposed in this area.

Both Koenigsberg and Ezzes object to the proposed settlement with the defendant NAFI Corporation. NAFI was charged in the Dann complaint with having sold inferior textile materials to Chrysler at excessive prices and in greater quantities than were needed. The defendants K. T. Keller, Samuel Keller, and L. L. Colbert allegedly were "financially interested in and involved with NAFI Corporation" and caused Chrysler to make such purchases. NAFI denied the charges though it admitted that K. T. Keller had owned varying quantities of its common stock.

NAFI is not a defendant in the Gallo action though the charges are repeated in substance in the Gallo complaint.

Under the terms of the proposed settlement the claim against NAFI will be dismissed with prejudice. NAFI will not be required to pay a consideration in any form to Chrysler. No release will be given to NAFI.

The record shows that the stock owned by K. T. Keller in NAFI never exceeded 1.05% of the outstanding common stock of the corporation. Apart from that, the record is devoid of any evidence of wrongdoing on the part of this defendant in support of the alleged claims. The objector Ezzes charges that "the proponents willfully refrained from developing evidence sufficient to enable a proper evaluation of the NAFI cause of action." I am satisfied that the charge of "wilifulness" on the part of the proponents is wholly unfounded and that the evidence adduced by the plaintiffs warranted their representation that they could not succeed in establishing that Chrysler had suffered any damages. Ezzes suggests an area where further evidence might have been sought by plaintiffs with respect to this cause of action. There is no showing by the objector, however, that any of this evidence if produced would have added substance to the alleged claim.

Next, the objector Koenigsberg seems merely to suggest that since NAFI is giving no consideration to Chrysler, the settlement should not be approved as to it. In view of the fact that both the plaintiffs and Chrysler agreed that the charges are unfounded and the record does not indicate anything to the contrary, I will approve the proposed dismissal as to this defendant if the general settlement is approved.

Ezzes also claims that the plaintiffs wilfully failed to produce evidence in support of the claims involving the so-called Consolidated Coal and National Steel transactions. Plaintiffs' attorneys represented in the notice that they had no evidence of any improprieties in these transtions. In my opinion such representations are fully supported by the extensive record on these matters. The objector says that further evidence should have been sought, but here, as in the NAFI transaction, there is no showing that the additional proof would add substance

to these claims. This is particularly true because of the evidence adduced before the Court.

The claims by the objector Ezzes that the salaries paid to Colbert and K. T. Keller constitute "gifts" are without substance. There is no evidence of wrongdoing in the negotiation of either of these contracts, and the "proof" tendered in support of the charges of breach of contract offers meager hope of ultimate success on these claims.

One other claim needs mention here. The objector Koenigsberg urges that the claims against the defendants Minor and Colbert with regard to the so-called Taxi-Ad transaction should be dismissed without prejudice and that neither defendant should receive a release or be reimbursed for his expenses by Chrysler. The objector does not contend that a real promise of success exists with respect to these claims. He states only that since neither defendant is presently an officer or director of Chrysler, neither can be said to have offered anything to Chrysler for settlement. He contends, however, that a "prima facie case" exists against Colbert.

After reviewing the evidence on this matter, I am satisfied, in view of Minor's relatively insignificant role in Chrysler's affairs and the disclosures involved, that no reason presently exists for not disposing of this claim as part of the general settlement.

Having weighed the claims asserted by the objector Ezzes to have merit and the possible defenses, I conclude that the probability of success in litigating any of such claims is so remote as to entitle them to practically no consideration in evaluating the fairness of the terms of settlement. I turn then to the claims asserted by the plaintiffs herein. The only claim which the plaintiffs now contend has merit is that which relates to incentive compensation. Let us examine this claim.

The tenth Dann cause of action and the eighth Gallo cause of action as finally amended stated several "claims"

relating to the present incentive compensation plan which was adopted by Chrysler's board and stockholders in 1956. These complaints alleged that the adoption of the plan was invalid and that the payments which were permitted thereunder were excessive and unconscionable. The formula was said to be improper because incentive compensation was permitted to be paid before the shareholders had obtained a reasonable return on their invested capital and because loss years were not set off against years in which there were profits in determining the availability of incentive compensation. Furthermore, plaintiffs claimed generally that payments had been inflated by miscalculations in applying the formula and by changes in accounting practices and policies. Finally, plaintiffs urged that at a matter of law officers found to be guilty of breaches of fiduciary duty to the corporation were not entitled to receive any incentive compensation whatever.

In the stipulation of settlement plaintiffs' attorneys represented that they had investigated the various claims under these causes of action and had reached the conclusion that the only issue that might profitably be pursued concerned the "fairness" of the existing plan. In attempting to evaluate the substantiality of this claim, however, one is met at the outset by the fact that plaintiffs or their attorneys have not further delineated the nature of the alleged "unfairness" purportedly found by them in the present plan.

Let us examine the present incentive compensation plan, plaintiffs' claims with respect thereto which might reasonably raise an issue as to "fairness", and the proposed modification of such plan.

Under the existing (1956) formula, incentive compensation awards may be made only for those years when consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *before* taxes on income and before provision for

incentive compensation and interest on long-term debt of the corporation, exceed 7% of the shareholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to 5% of such excess. The 1956 formula does not contain any provision limiting the bonus fund in any year to the amount of dividends declared in such year, or any other dividend limitation.

The only issue as to the "fairness" of this plan which might reasonably be said to have been raised in the Dann complaint and which has not been conceded by the plaintiffs to be without merit is the claim that the present plan is wasteful, because it permits payments to be made in excess of what could be granted under the comparable incentive compensation plans of Chrysler's principal competitors. The Dann complaint asserts that the plan should permit payments only when the income of the corporation exceeds a reasonable return on the stockholders' investment, the present Chrysler plan requiring a "set aside" only of 7% of the stockholders' investment before taxes, which is the equivalent of about 3½% after taxes. Such payments are said to have been particularly wrongful under the circumstances, because Chrysler's position in the automotive industry has declined since 1956 while the incentive payments to Chrysler employees during that period have nonetheless been substantial. A similar charge was made in the Gallo complaint.

It can be fairly said I think that, generally speaking, both the Dann and Gallo complaints challenge the set-aside percentage in the present plan as "unfair" on the ground that the return on the stockholders' investment is too small in relation to the amount of incentive compensation that can be awarded. In this sense "an issue as to the fairness of the existing plan", as stated by the proponents in the stipulation of settlement, can be said

to remain in the case. This disposes of a suggested objection to the settlement that it is not "related" to any of the causes of action. Compare Manacher v. Reynolds Metals (Del. Ch.), 165 A. 2d 741. I pass over for the time being the problem of evaluating the probability of success on the plaintiffs' part if ultimately they were to litigate this issue.

The proposed plan, as modified in accordance with the terms of the settlement, provides that for the years 1963 through 1969, incentive compensation awards may be made only for those years when the sum of (1) consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *after* taxes on income, and (2) provision for incentive compensation, and (3) interest on long-term debt of the corporation, exceeds 5½% of the stockholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the corporation during the year.

The basic changes brought about by the modification have been the conversion of what was previously a before-tax incentive plan into an after-tax plan, an increase[2] in the set-aside (i.e., the return on the stockholders' investment before payment of any incentive compensation under

[2] The 7% stockholders set-aside under the 1956 formula relates to before-tax earnings, whereas the 5½% stockholders' set-aside under the 1963 formula relates to after-tax earnings. Consequently, assuming a 50% effective tax rate, on an after-tax basis the 7% set-aside under the 1956 formula would be equivalent to only 3½%, as compared with the 5½% set-aside under the 1963 formula. Conversely, on a before-tax basis, the 5½% set-aside under the 1963 formula would be equivalent to 11%, as compared with 7% under the 1956 formula.

the plan), and an increase [3] in the percentage of compensation to be awarded after deduction of the set-aside.

Thus, the 1963 formula requires a higher level of earnings before any award of incentive compensation may be made, by reason of the higher set-aside. Until the "cross-over point" is reached (i.e., the point at a still higher level of earnings where the amount of the bonus fund would be the same under both formulas), the higher set-aside under the 1963 formula would more than offset the higher rate of bonus so that a smaller bonus fund would be created under the new formula than under the 1956 formula. But once the level of earnings rises above the cross-over point a larger bonus fund will result under the 1963 formula than under the 1956 formula. However, under the 1963 formula, as a result of the increase in retained earnings, the set-aside in each succeeding year becomes greater than it would have been under the 1956 formula thereby requiring an even better earnings performance in each of these years to obtain the same bonus fund.[4]

To a certain extent then plaintiffs can fairly claim that they have achieved at least one of the objectives of their suit which was to increase the set aside and thereby increase the amount of income which must be earned by the corporation before equivalent amounts of incentive

[3] The bonus rate of 5% under the 1956 formula relates to before-tax earnings whereas the bonus rate of 12% under the 1963 formula relates to after-tax earnings. Assuming a 50% effective tax rate, on an after-tax basis, the 5% bonus rate under the 1956 formula would be equivalent to 10%, as compared with the 12% bonus rate under the 1963 formula. Conversely, on a before-tax basis, the 12% bonus rate under the 1963 formula would be equivalent to 6% as compared with 5% under the 1956 formula.

[4] The amicus computed that for the ten-year period 1953 through 1962, the total bonus fund would have been $3,748,713 less than it was, had the 1963 formula been applied.

compensation can be paid. That is not to say of course that plaintiffs' claim as to "unfairness" in the present plan is well founded. Indeed, considering the facts of record now before the court, I think the probability was small that ultimate success could have been achieved on this issue. Because of this, however, the plaintiffs, defendants, and objectors have taken radically different approaches in attempting to sustain or attack the validity of the proposed settlement.

The plaintiffs vigorously urge that the proposed modification plus the changes in management, etc., which were mentioned before, are "beneficial" to Chrysler and accomplish the objectives of the lawsuit. Thus, the plaintiffs have attempted to formulate the settlement within the traditional framework of a quid pro quo offered by the defendants in exchange for releases from further liability.

The defendants, including Chrysler, ignore the traditional approach. They deny there is merit to any of the claims, and while they believe that the modified plan will be advantageous to Chrysler and its stockholders, they do not believe that it remedies any supposed defect in the old plan. They agree that apart from the settlement, Chrysler's management had not previously given any consideration to a modification of the existing bonus plan.

The defendant urge that regardless of the extent to which the modification can be said to "benefit" Chrysler, the court should approve the settlement as fair and reasonable, since the expense of continuing the litigations will far outstrip any potential recovery.

The objectors, except Ezzes,[5] agree with the defendants that all the claims are without merit and should be

[5] The Ezzes objections are considered above and have been rejected by the court. Ezzes, however, also joins in the objections here stated, viz., that the proposed modification is not a proper or adequate consideration for settling the lawsuit.

disposed of. They disagree, however, that the lawsuit may properly be settled on the basis proposed by the plaintiffs and defendants. The objectors' contentions are basically reducible to two propositions. First, it is said, the proposed modification offers no demonstrable benefit of any kind to Chrysler though, if approved, it will commit Chrysler to a substantial change in its compensation plan. Secondly, as a practical matter, approval of the modification by the court will create for Chrysler's employees, a number of whom are defendants herein, a larger fund for the year 1963 than would be available under the existing plan. The objectors say that reasonably viewed, the defendants must have been aware of such fact when they agreed to the settlement.

The objectors suggest that plaintiffs' attorneys supported the proposed modification as part of the settlement not because it would remedy some arguable defect in the existing compensation plan, but because it would give color to their claim for an allowance of attorneys' fees. The defendants were willing to accept these terms, it is said, because they were required to surrender nothing in return for their releases. Moreover, since Chrysler's earnings for the fiscal year ending in 1963 promise to exceed the "cross-over point", the bonus fund will be larger than if the 1956 formula were still in effect. For all these reasons the objectors urge that the proposed settlement be rejected as unfair and unreasonable.

Having considered the nature of the claims and the possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs. Obviously in such a case settlement of the litigation is in the best interest of the corporation and in fact is much to be desired from the point of view of all the interested parties. The problem I am confronted with here, however, with due regard for the court's obligation to exercise its judg-

ment with respect to the fairness of the settlement, lies in determining what terms may properly be accepted by the court.

Common sense it seems to me would dictate that where the hope of recovery on the part of the plaintiffs, and thus on the part of the corporation, is small, little can be demanded from the defendants by way of settlement. Certainly this is the case here.

The objectors say, however, that no settlement can be approved unless there is technical legal merit to the claims asserted in the complaint and consideration of some formal nature is offered by the defendants in exchange for their releases. Thus, they urge that if the complaints lack legal merit, they should be dismissed with prejudice. They should not be permitted to become the basis for a supposed settlement wherein the defendants offer nothing because the claims asserted against them have virtually no value.

Assuming without deciding that the rule urged by the objectors might be applicable in a case where the court could say with complete confidence that the claims lack "technical legal merit", nonetheless it is clear that this is not such a case. There is no doubt that in the technical sense many of the asserted claims would survive a motion to dismiss, assuming the defendants chose to press such a motion. Thus, if the court were to reject the proposed settlement, the parties would merely be in the position of having to continue the litigation. It is just this situation which, with some justification on either side, both plaintiffs and defendants hope to avoid. Under the circumstances, I think that the court need only determine whether the terms are fair when measured against the probability of recovery on the asserted claims.

The objectors next contend, however, for a wide variety of reasons, that the court ought not accept a modification of the incentive compensation plan as the basis for settlement. First, apart from the fact that the modified plan is

likely to give the individual defendants a greater return than the old plan for the year 1963, the objectors contend that the proposed plan cannot be shown to be an improvement over the old plan and therefore is not a "valuable consideration" offered by the defendants for settlement. The basis for this contention is that no one can adequately foresee what the future holds for Chrysler in the way of profits. The objectors purport to show that it is probable that Chrysler will operate in the future at or above the cross-over point and therefore that the payments to Chrysler employees will probably exceed what they would have been under the old plan. This conclusion, however, rests on the selective use of available financial data with which in my opinion one may either agree or disagree. The objectors say, however, that in any case the modification must be rejected because the proponents have the burden of showing that the modification will result in smaller incentive payments or otherwise provide some demonstrable benefit to the corporation and this they cannot do.

It is fair to say I think that no one can predict with certainty what degree of success Chrysler will have in its operations in future years. Although Chrysler enjoyed a series of profitable years from 1950 to 1957, it showed a loss in 1958 and 1959. No one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables, some of which have little, if any, relationship to the amount of effort exerted by management. To that extent of course the objectors are justified in asserting that the proponents cannot "prove" that incentive payments will be smaller in any particular year in the future. All that may be said in the final analysis is that under the preposed modification earnings will have to be higher, up to the cross-over point, in order for payments to be the same as they would have been under the old plan but once that point is exceeded, payments can be larger.

Does the fact that there is no assurance that the fund and thus the probable payments in any particular year will be smaller under the proposed formula than under the existing formula vitiate the modification of the incentive compensation plan as the basis for settlement? Clearly there are dangers involved in this type of settlement where the only "consideration" offered by the defendants is the taking of some corporate action which not only involves no immediate detriment to the "charged" defendants or "assured" benefit to the corporation but also may in fact ultimately result in larger compensation payments to the defendants, among others. That is only to say, however, that each such case must be considered on its own merits. The objection made is not so much that the defendants are not giving a sufficient "consideration" but that they are purporting to give a consideration when in fact they are giving no consideration at all. The objectors state that they would prefer the actions to be dismissed rather than settled on the proposed basis. Since a refusal to approve the settlement cannot be equated with a dismissal of the actions, the objection here seems clearly to be related to plaintiffs' claims for an allowance of attorneys' fees rather than opposition to the termination of the pending litigations.

I am satisfied that as a practical matter settlement on the basis of the proposed modification is fair and reasonable subject to the limitation hereinafter imposed. Rejection of the settlement generally would clearly not be in the interest of Chrysler or its stockholders. While, as I have indicated before, there can be substantial disagreement as to whether the proposed change in the incentive compensation plan is an "improvement", there is no substantial showing that it will be detrimental to Chrysler. To the extent that this issue may be said to be poised in the balance, I think that the overwhelming approval of the modification by Chrysler stockholders with the knowledge that they were

in effect approving the settlement constitutes a "plus" for the approval of the settlement.

Because much is made of it, I next consider the additional contention of the Dann plaintiffs that the "change" in Chrysler's management which has presumably occurred is itself sufficient consideration for settlement of the lawsuits. The Dann plaintiffs charged in their complaint that certain directors, officers, and employees of Chrysler were guilty of gross mismanagement, and they sought, inter alia, the appointment of a receiver for Chrysler. The Dann plaintiffs contend that a major objective of this litigation has been to effect a change in Chrysler's management. They claim that the present lawsuit coupled with Dann's earlier activities is substantially responsible for such change or changes as have occurred in Chrysler's management.

Assuming without deciding that Dann's activities both before and after the filing of the complaint produced what he now describes as a "change in management", how, one asks, does that fact bear on the issue as to the fairness of the proposed settlement?

The defendants deny that any changes or improvements in Chrysler which may have occurred since the commencement of the plaintiffs' activities are attributable to the plaintiffs. It is certain, in any event, that the so-called change of management is not a "benefit" tendered to Chrysler by the defendants as a term of the settlement.

As I view the matter, it makes little difference on the issue as to the fairness of the settlement whether plaintiffs are credited with the presumed change in management or whether such changes are in fact beneficial to Chrysler. The paramount factor, as was noted before at some length, is that Chrysler and its stockholders have little to gain from a continuation of these litigations. Even if I were to conclude that these changes of personnel are not attributable to the plaintiffs, it could hardly be urged that the

court should therefore withhold its approval of the settlement.

The objectors offer certain other reasons why the settlement on the proposed basis should be rejected. First, they say that modification of the incentive compensation plan could have been undertaken by the directors and stockholders apart from settlement if the modification were thought worthwhile. This is of course true, but it does not follow that the old plan was improper. Indeed, the record would support a contrary conclusion. This being so the new plan and tender thereof as a basis for settlement cannot be evaluated as merely the result of their having performed their duty.

The objectors next say, however, that stockholder approval should be disregarded here because the stockholders may have felt that the modified plan should be adopted not because it is meritorious in and of itself, but because it was in the interest of the corporation to terminate the litigations. Assuming that the psychological motivation of the stockholders was as the objectors suggest, nonetheless I do not think their objection is of decisive significance. After all the most that may be said is that the stockholders were called upon to make a business judgment weighing the desirability of continuing the litigations against the supposed merits of the modified plan. Their approval is at least some evidence that the terms of the proposed settlement are fair. To this may be added the fact that the raising of the so-called cross-over point should certainly in the long run result in an increase in the stockholders' equity.

Finally a point is made that the tendered plan is incompatible with the legal principle found in Nadler v. Bethlehem Steel Corp., 38 Del. Ch. 427, 154 A. 2d 146, and Duane v. Menzies, 37 Del. Ch. 416, 144 A. 2d 229 to the effect that the tendered terms of settlement must be sufficiently definite

and beneficial to be capable of present valuation at least in a comparative sense. First of all, the approval of this settlement will not constitute a judicial imprimatur of its future operation. Indeed, the court in the Nadler case later approved a settlement after it was made clear that its future operation was not being approved. While it is true that there is no assurance that during the "term" of this plan there will be a monetary "saving" to the corporation, the fact is that business-wise it should benefit the corporation. Therefore, considering its inherent limitations and the limited qualifications hereinafter imposed, I do not believe that the Plan runs afoul of either the Nadler or the Menzies cases.

I therefore conclude that in the application of the governing standards this settlement should be approved with one qualification. It is clear that the directors "bargained" for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the "new" plan would produce a substantially greater fund than would the old plan for 1963. Thus, even with due allowance for the fact that the future operation under the plan is an "unknown", I do not believe that it is appropriate for the director defendants who are beneficiaries under the plan to receive the fruits of the new plan for 1963. I will therefore approve the terms of settlement on the condition that the director defendants who are beneficiaries under the plan agree that as to the year 1963 they will derive no added financial reward solely as a result of the modification. If they so agree I will expect counsel to suggest mechanics by which such a result can be achieved. If counsel cannot agree they may submit suggested alternatives by a fixed date.

One further matter of substance requires attention. Under a separate arrangement Chrysler has agreed, if the present settlement is approved, to pay a $20,000 fee to

Dann's attorney in the libel action in the Superior Court. The Sandler objectors say that this payment is an "improper preference" to Dann over other stockholders and therefore should be disapproved by the court.

The testimony disclosed that at least some of the $20,000 payment is justified by Chrysler on the basis that it represents, in part, payment for legal services rendered the Dann plaintiffs in this litigation by the attorney involved. The balance is presumably justified on the basis of a business-judgment settlement by Chrysler of the libel action which was complicated for Chrysler by a contemplated counterclaim by Dann for damages based on alleged abuse of process.

Preliminarily, the court is not asked to "approve" the $20,000 payment. Thus, contrary to the request of the Sandler objectors, it cannot "disapprove" the payment as such. As a practical matter, all the court can do at this stage is disapprove the entire settlement on the ground that the intended payment renders the entire settlement unfair. I note, however, that the Sandler objectors do not urge that the settlement be disapproved on this score. They merely ask that the court not permit this payment.

In discharging my duty here, I have considered this dubious fee arrangement a negative factor in arriving at my judgment concerning the fairness of the terms of settlement. However, I do not consider it a sufficient basis for refusing such approval. If I felt that the payment were a sham or device to provide an out of court "pay-off" to obtain a settlement which ignored the interest of the stockholders generally, I would not hesitate to withhold approval of the settlement. The record, however, does not warrant such a conclusion. Moreover, the Gallo plaintiffs and their attorneys, who helped negotiate this settlement, did not participate in any of the negotiations surrounding the disposition of the libel action. Thus, I do not think the fairness of the

settlement herein is in fact impugned by the agreement to pay a fee to Dann's separate counsel.

However, I think it apparent that the payment of the $20,000 fee is, euphemistically speaking, intimately connected with the settlement of the derivative actions. Thus, to the extent that any of the intended fee represents payment for services allegedly rendered in connection with those actions, the effect of the arrangement would be to circumvent the powers generally exercised by this court in supervising such payments.

Thus, while the settlement itself ought not be disapproved as "unfair" because of the proposed payment, I am of the opinion that disposition of this fee matter should await the hearing on the question of plaintiffs' fees generally. Perhaps Dann and Chrysler will agree that payment of the stipulated sum or any part thereof will abide a decision by this court as to its propriety when judged by controlling Chancery standards. If not, then the matter will be considered in determining whether and to what extent Dann is entitled to reimbursement for counsel fees herein.

Other assorted matters not herein mentioned have been considered. They have been determined either to be consistent with the conclusions herein reached or irrelevant thereto.

Present order on notice.

ON MOTIONS FOR REARGUMENT

Motions for reargument have been filed by the Ezzes, Koenigsberg, and Sandler objectors. They say the settlement should be approved only on the condition that the new incentive compensation plan take effect as to all beneficiaries on January 1, 1964 rather than January 1, 1963, as provided in the proposed settlement. The basis for their

contention is found in this court's prior opinion. There the court said that the settlement would be approved on the condition that the director defendants who are beneficiaries under the plan agree that as to 1963 they will receive no additional financial reward solely as a result of the modification. This was done because it was found "that the directors 'bargained' for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963".

The objectors in effect say that there is no reason why any beneficiaries of the plan, not merely the director defendants, should benefit in 1963 when the financial picture for that year was as indicated, particularly since the new plan was tendered as a settlement device. In their answer to the objectors' motion, certain defendants say that the court erred in finding that the directors bargained for this settlement in the context above quoted. Thus, they say the condition was imposed on the basis of an erroneous premise and it would therefore be compounding the error to extend the condition to all the beneficiaries of the plan. They say that only one director participated in the negotiations and that he largely settled the terms as early as February 1962.

The problem under consideration must be evaluated in the light of the function the court was called upon to perform, viz., to pass upon the fairness of the settlement. Parenthetically, when the court was writing the original opinion, it considered the possibility of imposing the condition now suggested by the objectors.

Because the changed incentive compensation plan, rather than any "consideration" flowing from the real defendants, was tendered as the basis for the settlement, the court felt compelled to evaluate carefully the result of the change particularly insofar as the director defendants were concerned. It was reasonably clear to me from the record that there had been general public acceptance of Chrysler's cars

for the model year 1963. This was evident not only from the earnings picture for the last quarter of 1962 but from the figures for most of the first quarter of 1963. These matters plus the general financial prospects for Chrysler were of course known when Chrysler agreed to the settlement in final form in late February 1963 and again when the board confirmed the settlement in late March 1963. The knowledge and expectations of the defendant directors concerning Chrysler obviously put them in the position where they at least for the year 1963 could obtain a complete release from the litigation not only without paying anything personally but by finally approving a revised plan which would probably assure them even greater compensation payments for 1963.

In my prior opinion I used "bargained" in relation to the time the matter ripened for judicial consideration. Perhaps "bargained" was an unhappy choice of language. It might have been better to say "finalized". In any event the settlement cannot be justified by the directors by refusing to consider what the true situation was when the matter was finally ripe for submission to the court. They had a continuing duty to the stockholders to agree only to what was then fair.

I also note that the defendants' answer to the motion emphasizes that the new plan was negotiated by one director and that the director defendants subject to the condition constitute a minority of the entire board of directors. From these facts they seem to be suggesting that the imposition of the condition is either unfair or is based on actions which were not under their control. I need not consider the legal niceties of this problem in the context of mere adversary proceedings. As noted, the directors approved a settlement in the light of a profit picture which resulted in benefits to certain members of the board. Minority or not, the result was reasonably certain to provide some of its members who were defendants with a benefit

at least for 1963 which was greater than they would have received had the lawsuits been litigated and decided in their favor. In the face of the total picture presented, particularly in view of defendants' evaluation of the merits of the lawsuits, this was a benefit which I felt in fairness should be removed.

Thus, the court does not feel that the premise in the prior opinion for imposing the condition upon the director defendants is unwarranted. Nevertheless, this does not aid the objectors here because the non-director beneficiaries of the plan were not personally involved in approving the change and making it applicable to 1963. Also, not being defendants, they were not receiving any benefit for the release of corporate causes of action against them. Moreover, in the long view of this plan one cannot say with objective assurance whether it will or will not be more beneficial to the participants. Ineed, it may be less so. Thus, the court adheres to the limited condition imposed in the prior opinion.

The Sandler objectors also argue that the court should adopt the January 1, 1964 date generally, because it now knows the effect of the new plan for the year 1963. Passing over the element of hindsight, I believe this point overlooks the fact, noted above, that we are dealing with a seven year plan. The fairness test cannot be applied by looking at the results of only one year. The imposition of the condition on the defendant directors was imposed for reasons special to them.

Other grounds for reargument either are adequately treated in the prior opinion or do not call for any change therein. Thus, the motions for reargument are denied.

Present order on notice.

Post-Hearing Brief of Objector Arthur Hoffman to the Court of Chancery

The objector Hoffman, at this time, will merely make certain observations based upon the evidence adduced at the hearings upon the objections.

Firstly, it is respectfully pointed out that the amount of legal fees to be paid to the attorneys representing the individual defendants, which amount was revealed at the hearing, are totally excessive in view of the fact that Chrysler's attorneys were carrying most of the defense of this litigation. Further. the evidence at the hearing clearly showed that there was a substantial basis for the plaintiffs' claims of mismanagement at Chrysler. Therefore, to saddle the stockholders of Chrysler with attorneys' fees for services rendered for the benefit of officers and directors who condoned mismanagement would appear to be unconscionable.

In addition to the above the evidence at the hearing clearly showed actionable mismanagement on the part of Chrysler and to permit the officers and directors of this firm to get off scot free would appear to be unwarranted.

The undersigned requests the indulgence of the Court with respect to the law involved which will be set forth in detail at the time that Reply Briefs are due.

Dated: June 26, 1963

Respectfully submitted,

ARTHUR HOFFMAN, Objector
12 Landau Avenue
Elmont, New York

Motion of Objector Arthur Hoffman to the Court of Chancery to Stay Proceedings, to Take Depositions, and for Intervention

Arthur Hoffman, an objectant herein, hereby moves for a stay of proceedings for ninety (90) days in connection with the proposed settlement of the above-entitled actions and pursuant to Rules 26 and 34 to take the depositions of Sol A. Dann, Chrysler Corporation by its appropriate officer, NAFI Corporation by its appropriate officer, the corporate defendants named in the Complaints herein by their appropriate officers, and the individual defendants named in the Complaints herein, and to direct the parties, whose depositions are to be taken, to produce all relevant books, records, documents and tangible things relating to the issues involved herein and to permit the said objectant Arthur Hoffman to intervene in the above-entitled actions as a party plaintiff.

The grounds supporting the relief requested are set forth in the accompanying affidavit of Arthur Hoffman which is made a part of this Motion.

Dated: February 21, 1964.

Yours, etc.,

SOTIERE S. KAPSALIS,
Attorney for Objector,
Arthur Hoffman,
1001 Bank of Delaware Building,
Wilmington, Delaware.

I. WALTON BADER,
Attorney for Objector,
Arthur Hoffman,
170 Broadway,
New York, New York 10038

Affidavit in Support of Foregoing Motion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR HOFFMAN, being duly sworn, deposes and says:

I am a present stockholder in Chrysler Corporation and own twenty (20) shares of the common stock of that company. I am a stockholder of record on the books of said corporation and reside at 12 Landau Avenue, Elmont, New York.

This affidavit is submitted in support of the multiple Motion to permit me to take the depositions of the plaintiff Dann and the defendants in the above-entitled actions pursuant to Rule 26 and to require said plaintiff and defendants to produce all relevant and material books, records, documents and tangible things.

The Motion further seeks a stay of all proceedings in connection with the proposed settlement of the above-entitled stockholders' suits and to permit me to intervene therein as a party plaintiff.

In my opinion the charges made by Dann and Gallo, if in fact sustained, constitute a national disgrace particularly in view of the fact that Chrysler Corporation is one of the largest business entities in the United States.

I must confess to the Court that my specific knowledge of the charges involved has been derived from a reading of the Dann and Gallo Complaints and from the proceedings in connection with the proposed settlement. I have no personal knowledge of the matters involved nor have I taken any depositions in connection therewith.

My attorneys have advised me that the proceedings heretofore had indicate that the charges made by Dann and Gallo have some basis but that the present record is insufficient to warrant any conclusive determination.

My attorneys have further advised me that the Court's Opinion approving the settlement of the stockholders' liti-

gation involved herein was made on the basis of the record adduced before this Court.

My attorneys have received a telegram from the plaintiff Dann as well as a large number of documents which indicate both to my attorneys and to myself the very serious possibility of fraud in connection with the settlement of the above litigation.

The charges made by Dann are of a very serious nature and, if proven, would warrant, in both my attorneys' opinion and my own, the imposition of the most severe sanctions that this Court could make.

Obviously I cannot, merely on the basis of assertions made by Dann, state categorically that fraud has been involved in the making of the instant settlement. However I would be in a position to do so if I had an opportunity to examine all of the parties concerning all of the relevant facts and circumstances involved in the making of the settlement involved herein.

There appears to be enough in the papers to indicate substantial grounds for believing that fraud has been involved. Therefore I believe that the interests of the stockholders and of justice would be served by permitting me to have the opportunity of taking depositions of all of the parties involved and of requiring these parties to produce all relevant and material documents involving the issues of this litigation.

I realize that this proceeding has been protracted for a considerable period and therefore am willing to agree that, subject to the cooperation of the parties to be examined, that the depositions can be concluded within ninety (90) days. At the conclusion of this period I would be in a position to make an alternative application to the Court for leave to continue this litigation to trial and Judgment, for leave to request the imposition of additional conditions in connection with any settlement of the aforesaid litiga-

tion, or for leave to permit the settlement to go forward on the present basis.

The undersigned regrets that the shortness of time involved in connection with this application prevents the filing of an appropriate Memorandum of Law but I have been advised by my attorneys that wherever there is the slightest possibility of fraud in connection with stockholders' suits the Court must suspend all proceedings until a full and thorough investigation of any allegations of fraud is concluded.

I should be most happy to cooperate with the Amicus Curiae appointed by this Court in order to fully and thoroughly investigate the serious charges that have now been made.

I believe that I probably am a party to the above-entitled litigation by reason of my filing of objections to the settlement thereof. However, in order to remove all doubts, I request that this Court formally grant me the right to intervene as a party and to amend the captions of the actions accordingly.

s/ ARTHUR HOFFMAN.

(Sworn to February 21, 1964.)

Office-Supreme Court, U.S.
FILED
APR 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 893

ARTHUR HOFFMAN,
Petitioner,
against
SOL A. DANN, et al. and MARY L. GALLO, et al.,
"Respondents", Plaintiffs below,
and
CHRYSLER CORPORATION, et al., and
PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,
and
HERMAN KOENIGSBERG and
VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,
and
ERWIN H. EZZES,
Petitioner (No. 954, October Term 1964),
Objector below

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF SOL A. DANN, PLAINTIFF BELOW, IN SUPPORT OF PETITIONS FOR CERTIORARI

SOL A. DANN,
In Pro Se,
1820 David Stott Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF SOL A. DANN, PLAINTIFF BELOW, IN SUPPORT OF PETITIONS FOR CERTIORARI

This Brief is *in support* of the petitions filed on behalf of Arthur Hoffman in No. 893 and Erwin H. Ezzes in No. 954.

OPINIONS BELOW

The (forgotten) "unrecorded" Opinion of the Chancery Court, and the Opinion of the Supreme Court of Delaware are printed in this Appendix along with other Exhibits at pages 29-90.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1257 (3) and the rules, regulations and provisions of the Securities & Exchange Act of 1934.

QUESTIONS PRESENTED

1. Did the stockholders' notice contain false and misleading statements, contrary to the S.E.C. regulations?

2. Were the stockholders deprived of equal protection, a fair and impartial hearing, and of their rights, liberties and property without due process of law?

3. Is the Opinion of the Delaware Supreme Court erroneous and the product of a "whitewash" settlement?

INTRODUCTION

This plaintiff respectfully requests this Court to excuse the delay in filing this brief, which is due to fact that this plaintiff had hoped and relied upon "objectors" to fully and accurately explain his position before the court, and because of other circumstances beyond his control.

This plaintiff has been referred to in various ways. In the Court Below. Chancellor Seitz referred to and treated this plaintiff as an Objector (See Ex. H pages 44-46 this Appendix). Defendant would like to have this plaintiff joined to Chrysler wrongdoers and treated as a Respondent.

The side this plaintiff hereinafter referred to as Dann, chooses to be on is that of the stockholders; on the side of the Court; on that side which will result in substantial justice instead of a miscarriage of justice; on that side which will fully inform the Court of all the facts and all the circumstances surrounding these arrangements; on that side which will represent the best interests of the stockholders (if possible like an *Amicus*).

The fact remains that Dann requested the Objectors to take an appeal from the Order of the Chancellor and from the Order of the Delaware Supreme Court, in order to protect his interests and that of all the other stockholders.

> "Equity regards substance rather than form * * * and stresses the intent or spirit of the case. Court of equity * * * will look to the circumstances and not to the form of the transaction. Equity looks to the substance and not the shadow, to the spirit and not the letter * * * it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling. * * * It has always been recognized as the right, if not always as the absolute duty, of a Court clothed with the equitable jurisdiction which is here properly invoked, to apply its X-rays to all masks and covers and see through to the real substance." *19 Am. Jur. Equity, Sec. 459, page 317-8.*

> "Even though suppemental brief was filed too late and was not in accordance with requirements of Rule 18(3) of the Ninth Circuit, in complex case involving patent, rule could properly be relaxed, so

as to give Court benefit of counsel's views. *Bergman v. Aluminum Lock Shingle Corp. of America*, C.A. 9th, 1958, 251 F. 2d 801." *Barron and Holtzoff, Federal Practice & Procedure*, 3A, page 139.

When defendants sought to stifle this plaintiff by striking his Brief (not his Appendix) before the Supreme Court of Delaware, this plaintiff represented to that Court:

"Federal Questions Involved

"Striking this plaintiff's Brief and denying to him the rights and remedies prayed for would deprive the stockholders, as well as this plaintiff, of their property rights and remedies without due process of law, contrary to those rights and remedies guaranteed by the Constitution of the United States, more particularly the 14th Amendment.

"This Federal question, together with the Federal question concerning the violations of the rules and regulations of the Securities & Exchange Commission, as referred to in this plaintiff's Appendix, are specifically raised for determination by this Court in order that they may be reviewed, if necessary, by the Supreme Court of the United States or by any other court of Federal jurisdiction.

"This being a stockholders' derivative action, in equity, any appeal taken by and in behalf of any stockholder inures to his benefit, and should be heard '*de novo*' by this Court.

"This Court has the right to review this entire case *de novo*. This case having been removed to this Court by several objectors, there was no need for this stockholder plaintiff to also take an appeal in order to give this Court jurisdiction to review all the matters involved in these settlement arrangements."

"In the case of *Board of Commissioners v. Sanders*, 218 Indiana 43, 30 N.E. 2d, 713, (131 ALR 1048), the Court said:

"* * * when the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or *defend* for the benefit of the whole." (Italics supplied.)

"On page 1052, the Court said:

"If by the terms of the statute one or more may sue or *defend* for the benefit of the whole in the trial court, likewise such person or persons may prosecute or *defend* the action on appeal." (Italics supplied.)

"We are of the opinion that the petitioners in the instant action have alleged a sufficient possibility that the representation of their interests by the plaintiff may be inadequate." *69 ALR 2d, page 561.*

Briefs Filed by Respondents, Especially Gallo and Chrysler Rife With Inaccurate Statements, Errors and Omissions.

Therefore on April 7, 1965, Dann requested the Clerk of the Supreme Court of Delaware to transmit to this Court the following original five documents, namely, "Appendix of Plaintiff Appellee Sol A. Dann", "Brief of Plaintiff Sol A. Dann", "Reply of Sol A. Dann to Motion of Certain Defendants to Strike his Brief", "Petition of Sol A. Dann for Re-Argument", and "Petition for Re-Argument" filed by Hastings firm in behalf of certain plaintiffs below because these documents refute the statement of Gallo and Chrysler.

On the same day I was notified by the Clerk of the Delaware Supreme Court that "Subject papers were received by Supreme Court of U.S. Feb. 9, 1965."

I deem it necessary for this Court to examine these documents *in support of the* pending petitions for certiorari.

Injured Stockholders Are Also Entitled to Civil Rights and Liberties and Protection Equal to That Given to Corporations in Delaware.

Contrary to the representations in the Gallo and Chrysler briefs, the documents referred to clearly set forth that substantial *Federal* and constitutional questions are involved. These were raised before the Court Below, and are of great and of grave public importance and merit the review and consideration of this Court.

These Federal questions were duly, timely and repeatedly raised before Chancellor Collins J. Seitz because the "*stockholders' notice is contrary to SEC regulations.*" (Appendix of Sol A. Dann filed in Supreme Court of Delaware, A-29, A-32, A-33, A-43, A-44, A-45, A-46, A-48, A-50).

Federal questions were repeated, emphasized and argued before the Supreme Court of Delaware.

Page I of Table of Contents of "Brief of Plaintiff Sol A. Dann" refers to the Federal violation that "the stockholders' notice contained statements that were false and misleading, contrary to the S.E.C. regulations."

The Table of Citations on page I-a also refers to "S.E.C. Regulation, Section 240.14-a-9" and "S.E.C. Rule 14-a-5" and "2 Am. Jur. 682, Section 6."

On pages 1 and 2, and Exhibit 2 attached to "Reply of Dann to Motion of Certain Defendants to Strike his Brief," the Federal and constitutional questions were again specifically and clearly raised before the Supreme Court of Delaware.

On pages 6 and 9 of Dann's "Petition for Re-Argument" and the exhibit attached thereto, the Federal and constitutional issues were again raised.

The authority of the attorneys for certain respondents to file a brief in behalf of Karl Horvath without permission and against objections of the Dann firm is questionable. Their authority and power of attorney was revoked after their $50,000 offer to him that was explained in the documents, this plaintiff filed with the lower court.

COUNTER-STATEMENT OF FACTS AND HISTORY OF LITIGATION

This stockholders' litigation was instituted in 1961 because for many years the Management and personnel of Chrysler Corporation was riddled with conflicts of interest, malfeasance and misfeasance and other acts of corruption and mismanagement.

These areas of misconduct are partially described in the Bills of Complaint and the affidavit this plaintiff filed on March 27, 1963 in the Court Below.

The Now Prosperous Chrysler Corporation, the Ninth Largest Corporation in America, Faced Ruin a Few Years Ago Until Its Management Was Changed.

Many years ago Chrysler's former chairman of the Board, K. T. Keller, had an interest in Chrysler's suppliers who were given special privileges and favors too numerous to detail here; except to say that this conflict of interest at the very top seeped down into all levels and resulted in excessive and unnecessary orders, at increased prices, for inferior and defective parts.

This not only increased Chrysler's cost of production and repairs in untold millions, but set a pattern for other officials to imitate and follow, and they did follow, when this became common knowledge in the Chrysler plants.

These corrupt practices became such common knowledge in the market places that manufacturer's agents were told they had to "pay off" to get orders from Chrysler, and many did.

But when this misconduct became common street knowledge, Chrysler lost the reputation of being able to efficiently produce an automobile; to compete with the product and price of other automobile manufacturers.

Its payrolls were padded with nepotism; dealers were resigning their dealerships because customers were complaining of defective cars and favortism was given to those dealers in which officials had an interest. Morale in the corporation dropped below sea level.

Chrysler's products were fast losing public acceptance; its losses as a result thereof were running into the tens of millions.

Many financial analysts were sending out reports of doom, condemning Chrysler's management, recommending its "short sale" and against its purchase. Chrysler stock that was over $100 per share a few years before 1960 dropped to $37 (less than $10 to-day after splits) with no sign of recovery as long as the Keller management remained in power and the Keller policy continued.

This plaintiff at that time and for many years prior, was the owner of over 5,000 shares of Chrysler stock. (Its present equivalent after splitting would be over 20,000 shares.) Beginning in 1958 this plaintiff conferred with members of the Board of Directors of Chrysler and Prudential Insurance Co. to quietly correct these areas of corruption. (The Prudential Insurance Co., was a large Chrysler stockholder, and had also loaned Chrysler 250 million dollars.)

Former President Who Agreed to Pay Back $450,000 Admits Corruption Throughout Chrysler Management.

On February 27, 1964 Michael J. Hand, attorney for William Newberg, sent a letter to Chancellor Seitz which Presumably is a part of the record. He stated therein that:

> "* * * Many of the claims and causes of action asserted by the plaintiff in the Dann and Gallo cases are similar or identical to the claims made by Newberg in the Michigan cases against the defendant * * *."

On page 3 of said letter Mr. Hand said:

> "Newberg in his suit against Chrysler in Wayne County has based his cause of action to set aside his agreement with Chrysler on the following charges which resulted in *fraudulent* representations and inducements and the exercise of *undue influence*, *duress*, and *coercion* upon Newberg:
>
> "1. *That Colbert, Warren, Jones, Trippe (all defendants,* in the Delaware suit), and others, *unlawfully conspired* to use Newberg as a scapegoat behind which to hide and conceal the incompetence, maladministration, neglect, breaches of duty and self-dealing of which some of the co-conspirators were guilty (Paragraph 13).
>
> "2. That the conspiracy was commenced in anticipation of wholesale investigations into such directors' malfeasances, maladministration, neglect, breaches of duty, self-dealing, and other gross improprieties (Paragraph 14).
>
> "3. That upon becoming President of Chrysler, Newberg discovered executive-level practices which constituted favoritism and preference of certain friends, relatives and intimates of top

> executives and that he refused to be silenced by Colbert who feared Newberg would uncover and disclose instances of misconduct, maladministration, etc. (Paragraph 15)."

If they could do this to their "partner", Newberg, it is understandable why and how similar pressures were used on this plaintiff.

This litigation was commenced after outside counsel invited themselves in, and attached and associated themselves with the Dann firm. But they failed and refused to pursue the vast amount of potential evidence, leads to evidence, and information concerning the misconduct of the defendants which they undertook to do. They were more bent on disposing of the litigation by way of "settlement" and consenting to a "whitewash" rather than to vigorously pursue the litigation.

Dann, after learning of various misrepresentations and their purposes, sought to change counsel for the stockholders on several occasions, or bring in other counsel to represent and protect the stockholders, without avail. (They added intervenors with about 10 shares.)

Dann's outside counsel stipulated with the defendants, without his knowledge or consent, not to take the depositions of any defendants until Dann's deposition was completed. This dragged along for over a year. This plaintiff presented himself for examination on many trips to Delaware in an effort to have his deposition completed, but this was repeatedly delayed by excuses, adjournments and misunderstandings, through no fault of this plaintiff. Finally this plaintiff requested that, to avoid further delays, his deposition be promptly completed in Detroit where all his files and records were located, but without success.

While the litigation was in this stymied position, and corrupt officials remained in office, Dann conferred with representatives of Chrysler's outside directors who informed this plaintiff that steps were being taken to remove certain officials and correct the Management of Chrysler and its policies but that they needed to discontinue the litigation to fully accomplish the same.

They claimed that regardless of any amounts that the corporation could recover from any of the wrongdoers, it would be more beneficial not to have the wrongdoings exposed and pursued by litigation. They contended that this litigation (at that time) was affecting the public image of the corpoartion and interfering with changes that they were making and contemplated making in Chrysler's Management.

They insisted that the Chrysler stockholders would be more substantially benefited by foregoing individual recoveries from any defendants than by pursuing explosive litigation and seeking damages (in untold millions) from individuals involved.

This plaintiff was assured by director George Love, Chrysler's present chairman of the board, that if this plaintiff went along with their thinking, the Court and the stockholders would be fully informed

Subject to these conditions this plaintiff thereupon agreed not to pursue (or *nolle prosequi*) the litigation despite and notwithstanding the abundance of information, leads to evidence and potential evidence in his files which supports the allegations in the Complaints, *provided* the Court and the stockholders would be fully informed. This proviso was of utmost importance for the protection of the stockholders and the future welfare of the Corporation.

(As well as hundreds of those who furnished this plaintiff with information.)

It also transferred to the court, and relieved plaintiff of the entire burden of determining whether, in the final analysis the litigation should be pursued.

Gallos Institute Suit and Intervene. Double Trouble Begins.

It was at this juncture that the Gallo plaintiffs intervened, presumably in behalf of the stockholders, and presumably based upon evidence they too gathered of defendants wrongdoings.

But after reading the misrepresentations contained in the Gallo briefs, their purpose of intervening in the settlement negotiations and their implementation is obvious. "Their garb is the dress of Jacob, but their voice is that of Esau."

In disregard of the proviso and conditions of my going along with their thinking, limited depositions were taken by pre-arrangement of questions without regard to the information and potential evidence in this plaintiff's files (and in the absence of this plaintiff or any member of his firm). For the purpose of preparing a record that would persaude the Chancellor to approve the so-called settlement. *(Depositions of defendants were taken only after plans for settlement were tentatively agreed to.)*

Counsel filed a verified petition for fees and supporting affidavits in Delaware March 1963 (to persuade Court's decision on their request for 5 million dollars in fees) which contains statements of wrongdoing and merit of claims, inconsistent with and contrary to "unclear" statements (to influence decision of stockholders) in stockholder's notice of April 1963 stockholders' meeting held in Detroit, Michigan.

The Appendix and Exhibits Dann filed with the Court Below also show that Dann was assured and led to believe that there would be no approval of settlement until after the court was first fully informed of the areas of corruption and wrongdoing and merits of plaintiffs claims.

When this plaintiff testified before the Chancellor, he offered and attempted to introduce into evidence and turn over to the *amicus* and the objectors all of these documents; he attempted to make clear that he was persuaded by his co-counsel, "against his better judgment," to make the narrow, technical distinction between the word "evidence", as used in the strict legal sense, (that which could be introduced *at that time*, in Court, without objection, and that was in a form not subject to the hearsay rule, or other technical objections,) as distinguished from potential evidence or leads to evidence.

Dann was informed by his outside counsel that it was in this strict, narrow, technical sense that Chrysler used the word "evidence" (as then existing in the court record) in the stockholders' notice. But all the information of wrong doings would be placed before the Chancellor before the final approval of the settlement or dismissal of the litigation.

This plaintiff therefore testified before Chancellor Seitz that *keeping this narrow, technical distinction in mind*, "the information and documents would not be in such form in which it could be introduced as "evidence" *at that time*, until witnesses testified thereto; that until that time it was according to *their* strict definition of the word evidence, in the form of information, work product or potential evidence.

When this plaintiff was asked to give one or two illustrations, he testified that he was for example in posses-

sion of a Dun & Bradstreet report which showed that W. Alton Jones, at the same time he was a director of the Chrysler Corporation, was also a director of and owned most of the stock of, two Chrysler suppliers (which he originally purchased for about 4 million dollars) and later, according to the Dun & Bradstreet report, sold for 24 million dollars, (after this plaintiff began investigating the affairs of Chrysler.) But according to the strict definition he was required to give to the word evidence, this Dun & Bradstreet, report, as such, could not then and there be introduced as "evidence".

Also that the transcripts of depositions taken of Newberg and Minor in other litigation was not admissible as "evidence" in this case before Chancellor Seitz, unless agreed to or the objection waived.

Chrysler Notified of S. E. C. Violations.

This plaintiff, at that time, again renewed his objections to the stockholders' notice, which had previously been incorporated in a letter to the Chrysler Board of Directors dated (March 20, 1963) this letter was introduced in evidence as Ex. OX 428 and is attached to this Appendix as Ex. A. This letter to the Chrysler Board of Directors explained how defendants were violating and aborting the so-called settlement arrangements and the violation of the S.E.C. regulations.

When Chancellor Seitz filed his Opinion, dealing primarily with the (advantages) from the change of incentive plan and only briefly to the real consideration for not pursuing the litigation, this plaintiff immediately requested outside counsel to file a petition for reconsideration and to reopen the record as per the details of my

letters to them in the Appendix Dann filed in Delaware which they refused to do.

When the Dann firm also notified Delaware counsel to request the court for time for them to file such a petition the Court informed Dann and his firm through Delaware counsel that they had no right to make such a petition and that Dann and his firm had no right to speak except through Delaware Counsel, who were ostensibly representing him.

Dann and His Firm Again Found Themselves in a Helpless, Frustrated and "Hamstrung" Predicament.

This plaintiff therefore "disengaged" himself from his counsel and informed Chancellor Seitz of the "phony" and "improper" depositions and other improprieties resorted to, and filed a "Petition to * * * Reopen the Record," and among others requested the Chancellor to:

> "take all the appropriate disciplinary or investigative actions necessary under the circumstances pointed out to you at the hearing and if this Court finds it necessary, to then refer this entire matter to the authorities having jurisdiction thereof, including the American Bar Assn., local bar associations, and also to the Attorney General's office to determine whether a Grand Jury or other means be employed to determine whether there has been any conspiracy to deceive the Court or the stockholders."

The letters accompanying the Exhibits which were forwarded to the court under dates of February 14th and 18th, 1964 were included in the appendix filed in the Court Below. In this appendix, they are Ex. B & C & E (32-41). Copies of these letters to the Court were also sent to the *amicus*, who was supposed to have examined, *but who in fact, never examined* any of the potential evidence of wrongdoing on

the part of the defendants in my files. When the amicus refused to take any action I notified him on February 21, 1964 that I felt that it was his duty to do so under the circumstances, as appears from Ex. F in the attached Appendix. Pp. 41-42.

Lower Court Thereafter Changes Opinion.
But Designates it "Unreported".

The Lower Court denied my Petition to Reopen, as per Ex. D & H pp. 37 and 44 in the attached Appendix, but on March 4, 1964 rendered an "unrecorded" Opinion clarifying his previous Opinion. He said that in approving the settlement he was not deciding or determining the merits of the lawsuit. (See Ex J) pp. 48-51.

In this "forgotten" Opinion the Court said:

> "* * * In discharging its function of evaluating the fairness of the settlement, *the Court did not directly determine the merits of the litigation.* It merely weighed the claims and posible defenses in order to arrive at a determination as to whether the settlement was fair. * * *"

> "* * * to remove any doubt that the Court was merely approving the settlement rather than directly deciding the merits of the lawsuit, *I will strike from Mr. Corroon's proposed interlocutory and final orders wherever they appear the words 'on the merits'* * * *." (Emphasis supplied.) (Pages 3 and 4 of Unreported Opinion, Ex. J, pp. 48-51.)

On March 9, 1964, the Court below specifically referred to said Opinion and Order of March 4, 1964. See Ex. H (pp. 44-46).

In addition to his petition to reopen, Dann also notified the Court of the various violations and improper manner

in which the so-called settlement arrangements were implemented, contrary to the S.E.C. regulations by letter of February 21, 1964 and later by telegram, Ex. G (p. 43).

Appeal by Stockholders in Class Suit Inures to Benefit of All Stockholders.

This plaintiff requested the objectors to appeal to the Supreme Court of Delaware, he was of the opinion then, and is still of the opinion, that stockholders' litigation, unlike litigation generally, inures to the benefit of all the stockholders for whose benefit the action is brought. No named plaintiff has any greater or lesser rights or obligations than others, named or unnamed; every *pursuance* inures to the benefit of all, as a class.

After the appeals to the Supreme Court of Delaware, Dann filed an Appendix containing many of the documents hereinbefore referred to. But when Dann filed a Brief in pursuance of and predicated thereon, not to defendants' liking, they filed a Motion to Strike Plaintiff's Brief, (not his appendix) which this plaintiff replied to in a further detailed document entitled: "Reply of Sol A. Dann to Motion of Certain Defendants to Strike his Brief". This plaintiff again emphasized the many wrongs concerning these settlement arrangements and their implementation which are *contrary to the best interests of the stockholders.*

After the Supreme Court filed its Opinion primarily predicated on changes in "The incentive Plan" stating that in their opinion this was sufficient consideration for release of defendants and dismissal of case, because "in their opinion", there was little or no merit to the actions, this plaintiff filed a Petition for Re-Argument (Ex. O), (p. 81). This again pinpoints the disgraceful way this settlement was accomplished and legal rights violated, also pointing out other errors in the court's opinion.

Dann's Former Delaware Counsel Admitted That the Lower Court Went Too Far and That Court's Opinion Was Erroneous.

Even the Delaware counsel for stockholders filed a Petition for Rehearing because the Opinion was contrary to the facts and "Limited Depositions" that was prepared *for settlement purposes only* (Ex. N.) Pp. 77-81.

Even they could not digest and stomach the lower court's opinion. So they too filed a petition for rehearing, finally admitting to the "*Limited Depositions* that were taken" to support the so-called settlement. *Without which support the settlement would fall and should fall.*

Their petition says:

> "The fact is that while plaintiffs had conducted some investigation on their own, they had been prevented by Court Order from taking discovery prior to the commencement of settlement negotiations. Limited discovery was agreed to by defendants in connection with the contemplated settlement. Any statements concerning evidence were confined to the state of the record established by the limited discovery and did not undertake to state what might develop in the event that the causes of action should proceed to trial."
>
> "The notice which was sent to the stockholders by Chrysler Corporation pursuant to this Order of the Chancellor set forth the state of the admissible evidence which had been developed up to that point, and did not consider the probability of developing other evidence in the event that litigation should be pursued. The plaintiffs below did not and have not

admitted or agreed that the claims were 'worthless'. Moreover, plaintiffs have always taken the position that in view of the change in management at Chrysler it was in the best interest of the Company to settle the litigation rather than prosecute the claims through involved and costly litigation which would distract Chrysler personnel from corporate activities" (See pp. 77-81).

After the Supreme Court of Delaware denied the Petition for Re-Argument, this plaintiff requested the objectors to appeal to this Court as he had also previously requested them to do.

ARGUMENT

"State Courts are required to protect federally created rights."

Strauder v. West Virginia, 100 U.S. 303, 310-12.

It is conceded that Chrysler benefited by a "change in Incentive Plan" that now gives its officials even more than formerly; but now from profits of Chrysler that he was hired and paid to serve, instead of permitting him, to divert his conflicting efforts to his take of profits from a supplier corporation he had a greater interest and "incentive" in. But this was not the consideration that induced Dann not to pursue the litigation.

One of the great problems facing injured stockholders is the difficulty to obtain the help of competent lawyers free of conflicts of interest, free of the direct and indirect pressures exerted upon them by and through clients and "friends", free of the incentive to settle cases for "changes in incentive plans."

It is practically impossible for a stockholder to muster sufficient strength to fight the tremendous power of the corporate monopoly of legal talent available to defendants, *at corporate expense*, in stockholders' litigation. It remains to . seen how foolish it was for me to have tried.

Courts should request the S.E.C. to intervene in all stockholders litigation in a publicly owned company, to prevent or discourage strike suits, to prevent disposal of actions against corrupt officials merely by changing *their* "incentive plan". This would also unmask those who attach themselves as "objectors" or associated counsel, only to crush and prevent stockholders from pursuing their causes for action. With such "friends" one is better off with enemies he can watch. (Dann informed the Securities and Exchange commission and U. S. Department of Justice of the matters involved herein and requested them to intervene.)

Judge Ganey said it was not good for this country to permit rigged bids among the electrical appliance companies.

It was not good for America to conceal or tolerate conflicts of interest of Sherman Adams, Bobby Baker, or Billy Sol Estes. It is equally not good for Chrysler to permit any official like K. T. Keller who started this corrupt policy to remain on Chrysler's pay roll at the rate of $75,000 a year even though it be as a "consultant" in name only.

It is just as important to prevent corruption from destroying a large publicly owned corporation from within, as to prevent Russia from dropping an A bomb on the Chrysler plant.

There are over 100,000 stockholders in Chrysler. There are nearly twenty million stockholders in other American

corporations who need protection from any management guilty of conflicts of interests and other acts of wrongdoing that frequently destroys the morale of the entire corporation from within.

It has been aptly said: "The criminal is a person with predatory instincts who has not sufficient capital to form a corporation".

The Delaware Supreme Court's confirmation of the so-called settlement arrangements merely eliminated the necessity of long and costly litigation.

Although the decision of the Delaware Court amounts to a "judicial whitewash", Chrysler did change its management which was one of the primary purposes that the litigation accomplished.

Public Record Must Be Set Straight and True.

It was necessary for the Court to know the great need there was to institute this litigation and prevent the conflicts of interest in supplier corporations, increased costs, padding of bills, gifts for favors, nepotism, and employment of over 7000 unnecessary white collar employees (that Chrysler discharged after Dann's complaints) and other intolerable conditions in Chrysler. The stockholders were entitled to this information, and even the conscientious members in Chrysler's management, need to be made to understand that such corrupt conditions will not be tolerated by stockholders in the future in this or any other American corporation.

When it is disclosed that a Judge is corrupt he is not retained and rewarded with an increased salary, or retired as a "consultant" at $75,000 a year.

Dann's Argument Before Delaware Supreme Court.

This plaintiff in his argument before the Supreme Court of Delaware requested the Court to reverse the decision of Chancellor Seitz and reject the settlement arrangements because of "fraud, misrepresentations, overreaching, undue influence, no meeting of the minds, and no consideration, as set forth and indicated in the appendix, brief, and reply to the defendants' motion to strike his brief.

This plaintiff told the Delaware Supreme Court:

> "I am also opposed to any order that confirms these settlement arrangements and the unconscionable and improper manner in which they were implemented.
>
> "I am opposed to any order that dismisses any of these cases or that releases any of these defendants, at least not until after the court and the stockholders have been fully, clearly and truthfully informed. I respectfully submit that these reasons can only be more elaborately discussed and placed before this Court by the taking of additional testimony, by reversing the decision of the court below, by returning this case to the lower court to reopen the hearings, under proper instructions.
>
> "Permit me also to make very clear that if these cases have no merit, if there was no wrongdoing, if the institution of this litigation did not accomplish any benefit to Chrysler, then these cases should be summarily dismissed without any change in incentive plan, without any need for any consideration or the payment of any fees to any lawyers representing any of the plaintiffs.
>
> "But I submit that these ifs cannot be properly and fully determined by the present state of the record. After reading the half-truths and the mis-

leading statements in the briefs of the defendants, the need to file further reply briefs and appendices is imperative and I so request this Court for an opportunity to do so.

"Mr. Dabney in his deposition * * * clearly shows that he testified and stated why the word 'evidence' was used in the stockholders notice in the strict, technical, limited meaning; and as he testified, as he said, as a lawyer, he was using the word 'evidence' to refer to admissible evidence in a court, as distinguished from even depositions taken in other cases or potential evidence that leads to evidence, which was the very distinction they persuaded me to make and then to use against me.

* * * * *

"The incentive plan is much to do about nothing. The scramble over this dry rubber bone that Chrysler threw out is most interesting. This bone of contention was not necessary as consideration to dismiss worthless lawsuits. The change in incentive plan is too often used and attended with shadow boxing and sham battles that deceives and injures no one but the stockholders.

"It should not deceive any of the courts. Courts need not close their eyes or minds when it is sought to dispose of stockholders litigation, and it certainly should not close them when a change in incentive plan is used. If anything at all, that should arouse the Court's suspicion that there's something wrong; that there is something wrong in this case, as I pointed out to the court below and to this Court.

"This case reminds me of a policeman who closes his eyes. These lawyers are policemen for the protection of the corporation and the stockholders, and this Court.

"Delaware has become a symbol of corporations. It is only right that a Delaware court make a good

start in the right direction by no longer permitting the so-called changes in stockholders incentive plan to be rung down as the last curtain on litigation that is instituted for the protection of stockholders rights against the corruption and wrongdoing by those directors in a corporation who have a fiduciary obligation.

"The disposal—and 'disposal' is the right word to use, I suppose—of stockholders litigation commenced to expose corruption and punish the wrongdoers should not encourage the use of this type of curtain.

"I respectfully submit that the stockholders are not the wrongdoers in this case and should not be punished. And if I might add, least of all, myself.

"In the brief that was filed, in the few minutes that are left to me—it would take many hours and extensive briefs to point out to this Court the shameful and disgraceful way this stockholders litigation is being disposed of—they talk a lot about the stockholders vote. I submit stockholders vote like a rubber stamp. They are solicited by the management to return their proxies to the corporation.

"The emphasis that has been placed upon the stockholders vote in this case lacks the merit it seeks from this Court.

"In the brief it is stated here that the change in incentive plan was suggested by the stockholders.

"Mr. Dann: I am referring to the brief of Mr. Corroon. That is untrue. From the very beginning that was a bone thrown out by Chrysler and one of the first things I was approached by, approached with, I should say, to have this litigation discontinued, which would have permitted the old management to remain.

"They refer here to the fact that plaintiffs' counsel conceded and concluded there was no evidence. If you examine Mr. Dabney's deposition, you will find there where he states in no uncertain terms how unwise it was—he used the word 'unwise'—it was for Chrysler to have persuaded him to okay that kind of a stockholders notice. He admits I had nothing to do with it. And as you will see from the correspondence, as soon as it came to my attention, I took all the action that one could humanly take and still remain in his right mind with all the pressures. I refer to those pressures in that letter that I sent to the board of directors which is an exhibit in this case. I refer to all those pressures.

"Objectors—just what are these objectors doing in this case? They forced me, together with the Gallos, to bring five or six large suit cases of documents down to Delaware that contain the informers' statements about the many acts of corruption. The Gallos were invited to come to Detroit where it would be convenient to go over this before this stipulation was entered into.

"They talk about business judgment here. What businessman ever makes a judgment without knowledge of the facts? And yet when I brought all of these records down, for two days, two solid days, I sat in my hotel room while one of the Nemsers just turned pages. Only one objector showed up for about five or ten minutes, looked at two or three sheets and then left.

"Are these conscientious objectors? I have asked myself that over and over again. And what are the Gallos doing in this case? What interests are they serving? What is their purpose? From the very outset they were chiefly interested in seeing these cases dismissed.

"Justice Wolcott: Mr. Dann, you have two minutes.

"Mr. Dann: They talk here on page 3 that prior to the filing of the stipulation of settlement, plaintiffs' attorneys were able to make an extensive investigation by way of depositions, and so on and so forth. That is not true. As a matter of fact, I attached a copy of the questions that were given to Keller in advance, I learned about it later from another gentleman that they gave Keller the questions in advance as to the scope of the inquiry. Those were the only questions they were permitted to ask. And I took that copy from him and I gave you a Xerox copy of it.

"Is this an extensive investigation?

"And Mr. Dabney in his deposition says they were limited as to who they could call as a witness, who they could depose. As a matter of fact, I think they even entered into a stipulation to that effect, as part of the wonderful settlement arrangements. They couldn't go beyond what Chrysler was willing to permit plaintiffs' counsel to investigate.

"Of course, these statements here on page 4 are untrue that plaintiffs' counsel concluded that there was no evidence available to them, because it was available. There 'evidence' is used in the broad sense as the layman uses the word 'evidence', meaning potential and leads to evidence.

"And the letters over the signature of Mr. Dabney and Mr. Robinson clearly indicate, as they stated there, we did not agree to that but we will at the time of the hearing on the petition for fees point all of this corruption out, we will bring it before the court. And that is why, as I testified, I was so sick of the whole mess, and there was only one thought in my mind, and that is, it was the duty of the court below to go into this matter.

"Justice Wolcott: Your 15 minutes are up.

"Mr. Dann: I would appreciate the opportunity to file a brief in order to place before this Court all of the matters that I think are imperative to call to this Court's attention." (This was denied.)

It is now apparent to whom the Gallos, who instituted their suit and intervened after the settlement negotiations bogged down, owe their allegiance.

No Case Is Limited to or Determines Only "One Man's Freedom".

This appeal presents a rare opportunity for this Court not only to set this record straight, but to set a precedent in stockholder's litigation for other Courts to follow; for lower Courts that presently close their eyes with shame as they approve stockholder settlements, they know are based upon "misrepresentations," courts should be able to preside over stockholders litigation with their eyes open.

Unless courts of all states, *including the State of Delaware* are on their guard against settlements of actions against wrongdoers by "changes in incentive plans;" unless corruption is exposed; unless stockholders are given the practical unhampered and equal opportunity to establish their causes for action instead of permitting corporate defendants to stall, indefinitely delay and exhaust plaintiff stockholders;

Unless the plaintiffs in this case are given the right to establish that their causes for action have merit based upon the information and leads to evidence furnished to this plaintiff; (and *presumably* to the other plaintiffs) if cases can be whitewashed in the manner these were.

Then those in possession of information concerning acts of corruption and wrongdoing in this and other corporations will be discouraged and refrain from coming forward with such information; violations of the law will be encouraged, respect for one's fiduciary obligations and the Courts will be discouraged.

The right of a litigant to be heard on an issue of law or fact dispositive of his claim is one of the most fundamental rights of due process of law. *Reynolds v. Cochran*, 365 U.S. 525; *Hovey v. Elliott*, 167 U.S. 409.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted and, upon granting of such certiorari, the determination of the Supreme Court of Delaware approving the settlement arrangements should be in all respects vacated and set aside and all proceedings remanded to the Chancellor of the State of Delaware for further investigation and hearings as requested by petitioners and Dann.

Respectfully submitted,

SOL A. DANN
In Pro Se
1820 David Stott Building
Detroit, Michigan 48226

APPENDIX

EXHIBIT A

DANN'S OBJECTIONS TO CHRYSLER OF FALSE AND MISLEADING STATEMENTS IN STOCKHOLDERS' NOTICE

Law Offices
DANN, ROSENBAUM, BLOOM & KAUFMAN
1820 David Stott Building
Detroit 26, Michigan
March 20, 1963

Board of Directors
Chrysler Corporation
341 Massachusetts Ave.
Highland Park 3, Michigan

Attention:
Mr. George Love
Chairman of the Board

Re: Stockholders' Notice in Sol A. Dann, et al. vs Chrysler Corp., et al Circuit Court of Chancery of the State of Delaware In and for New Castle County. Civil Action #1330
and
Gallo, et al. vs. Ackerman, et al. #1585.

Gentlemen:

I deeply regret that your "Notice of Hearing on Settlement of Stockholders Suits" and recent press releases necessitate my calling to your attention the statements contained therein which are incorrect and misleading, and which are further misleading by virtue of significant omissions.

Our primary purpose, prior and subsequent to litigation, has been the protection of Chrysler and its stockholders, and in entering into the settlement, we concluded that the benefits to Chrysler and its stockholders, resulting therefrom, would far outweigh any recovery from the individual defendants, particularly considering the change in management and the Company's improved practices.

In keeping with this purpose, we agreed not to pursue the litigation despite and notwithstanding the abundance of information in our files that supports the allegations in our original and amended complaints.

But, we never agreed to permit anyone to make or approve the erroneous statements in your stockholders' notice to the effect that plaintiffs know of no evidence or information to support the charges set forth in the various causes of action. Such statements and the inferences created thereby were repeatedly rejected and repudiated by me, despite exhausting sessions until 4:30 in the morning and other pressures used in previous attempts to accomplish the foregoing.

It was neither necessary—nor appropriate in my judgment to use the stockholders' notice as a last resort, and represent to them that thorough depositions and investigations resulted in the determination by plaintiffs that they had no evidence or information to support the various charges made in the complaint.

As your counsel well knows, we did not fully develop or explore our information nor the evidence available to us, because of the pendency of settlement negotiations and the limitations imposed by your counsel on the scope of the examinations and number of witnesses deposed, etc. Such limited depositions would not be conclusive as to the evi-

dence available or that could be developed from the information in our files. Reference thereto should not have been made the basis of the conclusions you saw fit to draw in the stockholders' notice.

Since you saw fit on the top of page 18 to state such a minor detail as that "the plaintiffs and their attorneys in the Gallo action took no part in the discussions and stipulations regarding the libel suit or its disposition," you should certainly have stated our position and contentions as also set forth in letters to our co-counsel dated February 21, 1962 and February 13, 1963, which were brought to your counsel's attention. These negate any such statements as you attribute to us.

The notice to your stockholders and press releases being solely yours, you are requested to take appropriate action to correct the misrepsentations thereby created and to clearly and correctly state the position and contentions of plaintiffs.

Yours respectfully and sincerely,

Sol A. Dann

Certified mail
Return receipt requested

EXHIBIT B

Re: Dann, et al. v. Chrysler, et al.

Law Offices
DANN, ROSENBAUM, BLOOM & KAUFMAN

February 14, 1964

Chancellor Collins J. Seitz
County Court House
Wilmington, Delaware

Re: Dann, et al. v. Chrysler, et al.
Civil Action No. 1330
and
Gallo, et al. v. Ackerman, Chrysler, et al.
Civil Action No. 1585

Dear Chancellor Seitz:

Enclosed are copies of the documents I referred to and offered in evidence at the hearing that took place before you on Feb. 7, 1964 in the above matter.

I respectfully submit that they support my contentions in Exhibits 1 & 2, and the need for a stay of all proceedings until arrangements can be made, either by the Court acting on its own initiative or by myself, to bring in other counsel to represent and protect not only my interests but those of the other stockholders and the Chrysler Corporation itself.

As I indicated at the above hearing, and as appears from the enclosed documents, especially Exhibits 1 & 2, the "settlement arrangements" and more particularly the pro-

ceedings taken to implement these arrangements are and have been unfair, inadequate and unreasable and contrary to the best interests of the stockholders.

These documents show that the alleged statements and "conclusions" attributed to counsel for plaintiff in the stockholders' notice, relied upon by the Court in its Opinion, and the inferences conveyed therein to the stockholders, are contrary to and inconsistent with the facts, and as set forth in counsel for plaintiff's Petition for Fees and supporting affidavits.

Many vital representations in the stockholders' notice are also inconsistent with the affidavit I filed with this Court on or about March 27, 1963, more particularly paragraph 64 thereof which reads as follows:

> "64. In keeping with this purpose, it was agreed not to pursue the litigation despite and notwithstanding the abundance of information in deponent's files that supports the allegations in the original and amended complaints."

It is necessary to engage other counsel for all the plaintiff stockholders, including myself, because present counsel have not pursued this litigation in a proper, efficient or vigorous manner, to the detriment of the stockholders.

Neither have the "Objectors" and "Intervenors" pursued their objections going to the merits of the causes of action involved, as supported by my files and records, which they had the opportunity to examine but neglected to do so.

In order that the enclosed documents may be more readily identified, there is enclosed a brief summary of the documents referred to, all of which are incorporated herein by reference and marked as exhibits in red ink.

Adequate time is needed in order to engage other counsel, acquaint them with the problems involved, and to prepare for and take all the proceedings necessary to "reopen the record and hearings of this case and to otherwise take all the appropriate action necessary to fully and clearly inform the Court of the * * * facts and circumstances" involved herein, as more particularly requested in Exhibits 1 & 2.

Therefore, I respectfuly submit and request this Court to stay all proceedings for at least 60 days and not to approve any settlement arrangements with the defendants until such time as Your Honor can be fully informed concerning this entire matter, including the information in my files and the documents referred to at the hearing before you.

I further request Your Honor to take all the appropriate disciplinary or investigative actions necessary under the circumstances pointed out to you at the hearing and if this Court finds it necessary, to then refer this entire matter to the authorities having jurisdiction thereof, including the American Bar Assn., local bar associations, and also to the Attorney General's office to determine whether a Grand Jury or other means be employed to determine whether there has been any conspfiracy to deceive the Court or the stockholders.

Respectfully submitted & requested,

(sg.) Sol A. Dann.

cc:
Mr. Aubrey Lank
Amicus Curiae
P. S.

Copies of this letter and petition for the relief therein requested also sent to all counsel of record listed on attached sheet, except exhibits. S. D.

EXHIBIT C

Law Offices
DANN, ROSENBAUM, BLOOM & KAUFMAN
1820 David Stott Building
Detroit, Michigan 48226

Feb. 18, 1964

Chancellor Collins J. Seitz
County Court House
Wilmington, Delaware

In the Court of Chancery of the State of Delaware
In and For New Castle County.

Dann, et al v. Chrysler, et al
Civil Action No. 1330
—and—
Gallo, et al v. Ackerman, Chrysler, et al
Civil Action No. 1585

Petition to Stay Proceedings, Reopen Record, etc.

Dear Chancellor Seitz:

Enclosed are additional memorandum identifying the contents in the remaining 43 exhibits I sent to you and the amicus last Friday, February 14, 1964, to support my request that the Court, inter alia, postpone all proceedings in order to enable the employment of other counsel for the plaintiff stockholders, including myself.

I respectfully submit that this is necessary in order to enable the Court to become fully informed of the matters involved herein, as indicated by said exhibits and the statements I made in open Court on February 7, 1964.

Because of the shortness of time to engage and make proper arrangements with other counsel for such purposes, the matters involved herein being very extensive and complicated, and being unfamiliar with your local procedure, I request the Court to treat my letter of February 14, 1964 and this letter as a petition, and in the interim to formalize my requests that:

1) The Court reconsider any and all orders or opinions heretofore rendered in the above entitled cases in the light of the foregoing exhibits.

2) The record and hearings be reopened.

3) All proceedings be stayed for at least 60 days.

4 That no Order be entered approving any settlement arrangements until this Court has been fully informed of all the facts and circumstances referred to in my letter to you of February 14, 1964 and the exhibits referred to

5) That a Master in Chancery be appointed to hear any and all further testimony that may be submitted in support of any and all matters involved herein. That such Master shall also have the power to take testimony outside of the State of Delaware and wherever reasonable under the circumstances.

6) That the Court grant plaintiff such other and further relief as may be necessary to protect the interests of the stockholders and take such further actions as requested in my letter of February 14, 1964.

This letter petition is being filed with you and a copy thereof is being sent to all counsel of record as listed in said letter of February 14, 1964.

In the event your local rules require any formalities for the filing of this "letter petition" in the above entitled causes and to bring this petition on for hearing before you, I would appreciate your advising me accordingly.

Respectfully requested and submitted,

(sg.) Sol A. Dann
In Pro Per

CC:
Amicus Aubrey B. Lank
and all counsel of record

EXHIBIT D

COURT OF CHANCERY OF THE
STATE OF DELAWARE

Collins J. Seitz
Chancellor

Court House
Wilmington, Delaware

February 18, 1964

Sol A. Dann, Esquire

Re: Dann, et al. v. Chrysler, et al.
Gallo, et al. v. Ackerman, et al.

Dear Mr. Dann:

I acknowledge your letter of February 14, 1964, with enclosures.

Your renewed application to extend the time to reopen the record, etc. is denied for reasons already appearing in the record.

Other matters mentioned by you are not so clear to me that I intend to take any action with respect thereto. You,

of course, are free to pursue whatever avenues are available if your believe there has been a miscarriage of justice either with or without your prior cooperation, tacit or otherwise.

Very truly yours,

Collins J. Seitz
Chancellor

(Copy mailed to all counsel of record.)

EXHIBIT E

LETTER TO CHANCELLOR SEITZ TO REFRAIN FROM ENTERING ANY ORDER THAT WOULD APPROVE A "WHITEWASH SETTLEMENT".

Law Offices
DANN, ROSENBAUM, BLOOM & KAUFMAN

February 21, 1964

Chancellor Collins J. Seitz
County Court House
Wilmington, Delaware

Re: Dann, et al v Chrysler, et al
Gallo, et al v. Ackerman, et al

Dear Chancellor Seitz:

Thank you for your letter of February 18th. I regret that some of the matters I mentioned are not too clear to

you. If given the opportunity I believe these can be clarified.

I respectfully submit that I am only one of several named plaintiffs in this "*class*" suit, instituted by Karl Horvath who signed the Bill of Complaint in behalf of thousands of unnamed stockholders (Karl Horvath was never examined). I submit that no "miscarriage of justice, either with or without (anyone's) prior co-operation, tacit or otherwise" would permit the approval of any arrangement that results in a miscarriage of justice.

These tenative "settlement arrangements" still need your order of approval before they can become final and binding on the stockholders. This Court is still free to pursue whatever avenues are available to prevent any miscarriage of justice such as described in the petition I mailed you on Feb. 18, 1964.

In the final analysis, the approval of any settlement is your sole responsibility.

My efforts throughout were directed toward having your Honor fully informed before you entered any order of approval.

I trust you will appreciate the predicament I have been in as a result of the many "pressures" I referred to on the bottom of page 1 of my letter dated March 20, 1963 which was exhibit 11 of the documents I sent you.

If any statement I made is not taken out of context, I thought you would understand this despite the hair-splitting technical distinctions I was persuaded to make against my better judgment between evidence vs. information.

It was in keeping with my obligations to the Court and the stockholders that I sent you exhibits that clearly indicate that I have always been opposed to any *whitewash settlement*. I also objected to anyone making the Court a party thereto without his knowledge. (See exhibit 31 on page 14 of Petition to Reopen, etc.)

Perhaps I—alone—should have exerted greater efforts to protect the Chrysler stockholders and the Court. If I have made a mistake it is never too late to correct it. I have made many mistakes in my lifetime, but I always found life easier to bear after I confessed and hastened to correct them. If I have failed in this respect I have at least tried—and am still trying—against all odds.

Religion has never meant anything to me unless it could be put into practice.

There is nothing more maddening than to be told you will be punished if you do the right thing. This is a frustration I could not live with. My religion has taught me essentially ethics and a way of life that deals with man's relationship to man as a means of finding relationship with his Creator. Our first obligation as lawyers is to treat the Court and our fellowman justly.

Since you have requested all parties to submit a proposed Order, regardless of objections to the settlement;

Therefore, without waiving any of my objections and specifically reserving all of my rights, as more specifically set forth in my "letter petition" of Feb. 14th and Feb. 18th, 1964, I am submitting for your consideration the attached proposed "Temporary Order", which may help to solve some of the problems involved. I have used the orders already submitted as guide lines. But I sincerely hope

and trust you will still reconsider all that has transpired before entering any order of approval.

Respectfully & sincerely yours,

Sol A. Dann
In Pro Per

cc:
Mr. Aubrey B. Lank
Amicus Curiae
Register of Chancery
And all counsel of record.

EXHIBIT F

LETTER TO AUBREY B. LANK, AMICUS, REQUESTING HIM TO EXAMINE MY FILES AND RECORDS

Feb. 21, 1964

Mr. Aubrey B. Lank
1118 Wilmington Trust Bldg.
Wilmington 1 Delaware

Re: Dann, et al v. Chrysler, et al
Civil Action No. 1330

Dear Mr. Lank:

In reply to your letter of February 18th wherein you state "I do not know why you continue to send these documents to me as I have no responsibility in this matter after the completion of my original report", permit me to remind you that not unlike the attorneys in this case, you,

as amicus curiae, assumed extraordinary fiduciary duties and obligations to the Court and the stockholders.

> "* * * whenever facts are placed before a Court which cause any suspicion of collusion between the parties, no matter in what way or form the facts are brought to the knowledge of the Court, it is the duty of the Judge at once to institute such an examination as will satisfy him of the truth or falsity of the charge". Quoting from Section 6, 2 Am. Jur. 682 under title of Amicus Curiae.

I regret that you did not avail yourself of the opportunity I extended you to examine the many suitcases of documents I produced in Delaware last May. Nevertheless, I am again inviting you to come to Detroit and examine these documents, and to file a supplemental report after you have examined these documents in the light of my recent Petition to Reopen, etc.

Sincerely,

Sol A. Dann

cc:
Hon. Collins J. Seitz
Register in Chancery

EXHIBIT G

TELEGRAM TO CHANCELLOR SEITZ REQUESTING OPPORTUNITY TO FILE EXTENSIVE AMOUNT OF INFORMATION AND POTENTIAL EVIDENCE AND LEADS TO EVIDENCE.

February 27, 1964 12:15 P.M.

Chancellor Collins J. Seitz
County Court House
Wilmington, Delaware

IN ORDER TO AVOID ANY MISUNDERSTANDINGS AND PROTECT CHRYSLER STOCKHOLDERS AND CORRECT PRESENT INCOMPLETE CONDITION OF RECORD AM ATTEMPTING TO DIGEST AND PLACE BEFORE YOU IN BRIEF FORM FOR YOUR HONOR'S CONSIDERATION AND OTHERS EXTENSIVE AMOUNT OF INFORMATION AND POTENTIAL EVIDENCE AND LEADS TO EVIDENCE FROM MY FILES THAT SUPPORTS CONTENTIONS IN MY RECENT PETITION TO REOPEN RECORD, ETC. IN CHRYSLER MATTER. THIS WILL NEGATE AND REFUTE STATEMENTS IN STOCKHOLDERS' NOTICE ETC. IN RE MERITS OF PLAINTIFF'S CAUSES OF ACTION AND UNWARRANTED OR UNAUTHORIZED CONCESSIONS OR CONCLUSIONS IN REFERENCE THERETO; ANY INFERENCES, DEPOSITIONS, TESTIMONY OR STATEMENTS BY ANYONE TO THE CONTRARY NOTWITHSTANDING. BUT THIS WILL TAKE AT LEAST TWO OR THREE WEEKS THEREFORE RESPECTFULLY REQUEST YOU TO WITHHOLD THE ENTERING OF ANY ORDER IN REFERENCE THERETO OR IN RE SAID STOCKHOLDERS' NOTICE OR RE SETTLEMENT ARRANGEMENTS UNTIL SUCH TIME AS I AM ABLE TO FILE SAME WITH YOU SO THAT SAID POTENTIAL EVIDENCE, LEADS TO EVIDENCE OR INFORMATION CAN SPEAK FOR THEMSELVES, OR, IN ALTERNATIVE, RESPECTFULLY REQUEST THAT YOU DIRECT YOUR AMICUS, AUBREY LANK, TO EXAMINE SAID RECORDS AND TAKE MY DEPOSITION IN REFERENCE THERETO IN DETROIT IMMEDIATELY. COPIES HEREOF BEING MAILED TO COUNSEL OF RECORD INCLUDING OBJECTORS AND INTERVENORS.

Sol A. Dann
In Pro Per

EXHIBIT H

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EXCERPTS FROM ORDER ON CERTAIN MATTERS RULED UPON AT HEARINGS ON FEBRUARY 7, FEBRUARY 17, AND FEBRUARY 24, 1964 (NOTING DANN'S OBJECTIONS).

The Court having heard arguments from counsel on February 7, 1964 upon (1) the form and contents of the order to be entered on the Court's opinions of December 31, 1963 and February 7, 1964; (2) the written motions and objections by the objectants Sandler, et al., and the objectant intervenor Koenigsberg, respectively, directed to the defendants' proposed order; and (3) *the plaintiff Dann's oral application to repudiate and reopen the settlement on various grounds, his oral objection to the settlement, his oral application to continue the hearing of February 7, 1964 to allow him time to secure new counsel and for such new counsel to familiarize himself with the litigation;* and the Court having considered the motions for reargument filed by objectants and the intervenor and the answer filed by certain defendants to the said motions for reargument; and the Court having filed a supplemental opinion on February 7, 1964 on the motions for reargument and having made certain oral rulings at the time of the hearing on February 7, 1964 and having filed a memorandum opinion on February 18, 1964, on the form and contents of the order to be en-

tered on the Court's opinions of December 31, 1963 and February 7, 1964; and

* * * * *

The plaintiff, Sol A. Dann, by letter dated February 14, 1964, having renewed his application that the Court stay all proceedings and not approve the settlement, and the Court having replied to said letter by its letter of February 18, 1964; and

The Court having heard argument from counsel on February 24, 1964 upon (1) motion of objector Arthur Hoffman for a stay, to take depositions and for intervention, and (2) oral motion of defendant W. C. Newberg objecting to the terms of the settlement and for a stay *and plaintiff Sol A. Dann having filed on February 19, 1964 his "letter petition" for reconsideration of any and all orders heretofore entered in these cases, reopening the record and hearings herein, a stay of all proceedings for a period of 60 days, and for other relief, and the Court having evonsidered said matters, including all documents submitted by plaintiff Dann in support of his said applications and objection, and his renewal thereof, and his said "letter petition"; and*

* * * * *

It is Ordered as follows:

1. The motions for reargument filed by the objectants-intervenor be and the same hereby are denied.

2. *Based on the entire record of this case, the said applications and objection of the plaintiff Dann, and the renewal thereof, and said "letter petition" by plaintiff Dann be and the same hereby are denied in all respects.*

3. The motions of ojector Hoffman and defendant Newberg are denied in all respects, except that said objector

is hereby granted leave to intervene as a party plaintiff herein for the sole purpose of objecting to the fairness and adequacy of the settlement and said defendant is hereby granted leave to file a letter memorandum in support of his objection to the settlement on or before February 28, 1964 and defendant Chrysler Corporation to reply thereto as soon as possible thereafter, if it so desires.

4. Defendants' objections to interrogatories 12 through 18 of intervenor Koenigsberg are sustained.

* * * * *

6. The Court reserves jurisdiction as to the form of order or orders to be entered on the Court's opinions of December 31, 1963 and February 7, 1964.

(Emphasis supplied.)

/s/ Collins J. Seitz,
Chancellor.

Wilmington, Delaware,
February 28, 1964.

EXHIBIT I

COURT OF CHANCERY OF THE
STATE OF DELAWARE

Collins J. Seitz
Chancellor

Court House
Wilmington, Delaware

February 28, 1964

Michael J. Hand, Esquire

Re: Sol A. Dann, et al. v. Chrysler, et al.
Gallo, et al. v. Ackerman, et al.

Dear Mr. Hand:

I acknowledge your letter of February 26, raising some question about the adequacy of the notice to you of the presentation of the order incorporating my earlier rulings. First of all, the court indicated at the hearing, which you attended, what was to be incorporated in the order and the entry was deferred merely so that Mr. Corroon could cause it to be retyped. Therefore, I do not consider the notice provision applicable to this situation.

As to your objection to the form of order I believe it fairly incorporates my rulings. I find this to be so after checking the transcript of the hearing.

I also received your letter of February 27, and have caused a copy to be delivered to Richard F. Corroon, Esquire, of Berl, Potter & Anderson, Delaware Trust Building, Wilmington 1, Delaware, who is one of the principal counsel for the defendants. If there is any further correspondence, I suggest that you include Mr. Corroon among those to receive it.

I have directed Mr. Corroon to send you a conformed copy of the order entered today and in due course you will be notified of my decision on the matter reserved.

Very truly yours,

Collins J. Seitz,
Chancellor.

EXHIBIT J

In the Court of Chancery of the State of Delaware
in and for New Castle County

MEMORANDUM OPINION *(Unreported)*

(March 4, 1964)

Daniel O. Hastings, Clarence W. Taylor and Russell J. Willard of Hastings, Taylor and Willard of Wilmington; Lewis M. Dabney, Jr. and Herbert Robinson of New York City; and Frank Rosenbaum of Dann, Rosenbaum, Bloom & Kaufman of Detroit, Michigan, for plaintiffs in Civil Action No. 1330, except Dann.

William E. Taylor, Jr. of Wilmington; Norman S. Nemser and Stanley Nemser of Nemser & Nemser of New York City; and Irving Steinman of New York City for plaintiffs in Civil Action No. 1585.

Aaron Finger and Robert H. Richards, Jr. of Richards, Layton & Finger of Wilmington and Milton Pollack of New York City for defendant, Chrysler Corporation in Civil Action No. 1330 and Civil Action No. 1585.

Richard F. Corroon of Berl, Potter & Anderson of Wilmington; David W. Peck and Howard F. Milman of Sullivan & Cromwell of New York City for defendants, Jones, Brady, Dodge, Love McCollum, McElroy, McNeill, Page, Trippe and Warren in Civil Action No. 1330 and defendants, Van Bomel, Coleman, Love, McNeill, Dodge and Estate of W. A. Jones in Civil Action No. 1585.

Daniel L. Herrmann of Herrmann, Bayard, Brill & Russell of Wilmington and Robert Ehrenbard of Kelley, Drye, Newhall, Maginnes & Warren of New York for defendants Ackerman, Bright and Laughna in Civil Action No. 1330 and defendants Ackerman and Bright in Civil Action No. 1585.

S. Samuel Arsht of Morris, Nichols, Arsht & Tunnell of Wilmington and Robert Ehrenbard and Francis S. Bensel of Kelley, Drye, Newhall, Maginnes & Warren of New York City for defendants, Colbert, Jacobson, Leary, Misch, Quinn, Row, Townsend and Woolson in Civil Action No. 1330 and defendants, Colbert, Leary, Misch, Quinn, Townsend, Woolson and Zeder in Civil Action No. 1585.

Clyde M. England, Jr. of Killoran and VanBrunt of Wilmington for defendant, K. T. Keller in Civil Action No. 13330 and Civil Action No. 1585.

John J. Morris, Jr. of Morris, James, Hitchens & Williams of Wilmington for defendant, NAFI Corporation.

Albert W. James and Arthur J. Sullivan of Morris, James, Hitchens & Williams of Wilmington for defendant, Jack W. Minor in Civil Action No. 1330 and Civil Action No. 1585.

Howard M. Handelman of Wilmington and Norman Annenberg of New York City for objector, Erwin H. Ezzes.

Irving Morris and Joseph A. Rosenthal of Cohn & Morris of Wilmington for objectants, Judson, Cassady and Seeman, Executrices, and objectant, Sandler.

Frank J. Miller of Walker, Miller & Wakefield of Wilmington for intervenor, Herman Koenigsberg.

Sotiere S. Kapsalis of Wilmington and I. Walton Bader of Bader and Bader of New York City for intervenor, Arthur Hoffman.

Michael J. Hand of Hand, Kiefer, Allen & Ryan of Detroit, Michigan for defendant, William C. Newberg.

Sol A. Dann, Pro Per.

SEITZ, Chancellor: The defendant, William C. Newberg, objects to the dismissal of the cases without prejudice as to him but with prejudice as to the other defendants. He apparently wants the dismissal also to be with prejudice as to him or the opportunity to litigate the merits of the claims. This is my decision thereon.

I cannot find where the dismissal without prejudice as to Newberg and the dismissal with prejudice as to the other defendants works any legal prejudice to Newberg. *In discharging its function of evaluating the fairness of the settlement, the court did not directly determine the merits of the litigation.* It merely weighed the claims and possible defenses in order to arrive at a determination as to whether the settlement was fair. See Braun v. Fleming-Hall Tobacco Co., 33 Del. Ch. 246, 92 A. 2d 302. Under these circumstances it is difficult to see how the judgment here entered could have either a res judicata or collateral estoppel effect on present or prospective litigation involving Newberg's personal rights or obligations. *To remove any doubt that the court was merely approving the settlement rather than directly decided the merits of the lawsuit, I will strike from Mr. Corroon's proposed interlocu-*

tory and final orders wherever they appear the words "on the merits and". However, except as to Newberg, the complaints will be dismissed with prejudice as to all defendants. (Emphasis supplied.)

A conformed copy of my order denying this aspect of the Newberg application is attached. I am also this day entering the order approving the settlement and directing Mr. Corroon to send Mr. Hand, Mr. Dann, and Mr. Bader a conformed copy thereof.

EXHIBIT K

In the Court of Chancery of the State of Delaware
in and for New Castle County

FINAL DECREE AND JUDGMENT

This 9th day of March, 1964, the Court having entered its Order of *March 4, 1964*, and the affidavit of G. T. Higgins, an officer of Chrysler Corporation, having been submitted to the Court, and the Court finding that the individual defendants Ackerman, Bright, Leary, Love, Misch, Quinn and Townsend have each executed with Chrysler Corporation an agreement in the form annexed to said Order of March 4, 1964 as Exhibit A, it is, for the reasons set forth in the Court's opinions of December 31, 1963 and February 7, 1964, and in accordance with said *Order of March 4, 1964* (Emphasis supplied.)

Ordered, Adjudged and Decreed:

1. The complaints as amended in the above actions are dismissed with prejudice as to the defendants Paul C. Ackerman, James C. Brady, R. S. Bright, Lester L. Colbert, Joseph M. Dodge, C. L. Jacobsen, W. Alton Jones,

John D. Leary, George H. Love, L. F. McCollum, Neil McElroy, R. E. McNeill, Jr., F. W. Misch, Robert G. Page, E. C. Quinn, E. C. Row, Lynn A. Townsend, Juan T. Trippe, Louis B. Warren, L. I. Woolson, K. T. Keller, R. T. Keller, R. P. Laughna, Jack W. Minor, NAFI Corporation (now Chris-Craft Industries, Inc.), John A. Coleman, James T. Farrell and Morgan Guaranty Trust Company, as Executors of the Estate of W. A. Jones, deceased, L. A. Von Bomel and James C. Zeder, and judgment is entered in favor of each such defendant.

2. The complaints as amended in the above actions are dismissed without prejudice as to the defendant William C. Newberg.

3. Plaintiffs and defendants are directed to make effective the settlement and compromise of this action in accordance with the terms and conditions of the Stipulation of Settlement, dated March 5, 1963, and, upon final approval by the Court, as that term is defined in paragraph 4 of said Stipulation, Chrysler Corporation is directed to execute and deliver to each of the individual defendants who is a party to said Stipulation and to all past or present directors of Chrysler, except defendant William C. Newberg, a release in the form annexed to said Stipulation as Exhibit B.

4. Neither this order nor the Order of March 4, 1964 shall be deemed to constitute judicial approval under then existing conditions of any payment made pursuant to the modification of the Chrysler Corporation Incentive Compensation Plan, as approved by the stockholders of Chrysler Corporation on April 16, 1963, or of any award made pursuant to said modification either before, or subsequent to, the date of this order or said Order of *March 4, 1964*.

5. When the agreement in the form annexed to said order of March 4, 1964, as Exhibit A, becomes finally effec-

tive, Chrysler Corporation shall deduct from the Incentive Compensation Fund for 1963 an amount equal to the reduction in incentive compensation for 1963 for the said defendants who have executed said agreement and shall return such amount to earnings.

6. The Court reserves jurisdiction of these actions with respect to all matters relating to the consummation of the settlement and making operative the stockholders' resolution of April 16, 1963, and to applications by plaintiffs, the objectants and the *amicus curiae* for allowances of fees and expenses. No fee applications will be processed or applications for fees by objectors filed until final approval by the Court, as that term is defined in paragraph 4 of the Stipulation of Settlement, dated March 5, 1963. Evidence pertinent to the disposition of fee applications will be determined in connection with those hearings and not at this time.

s/ Collin J. Seitz,
Chancellor.

EXHIBIT L

DECISION OF THE SUPREME COURT OF DELAWARE

WOLCOTT, J.;

These are appeals from a judgment of approval of the settlement of a stockholders' derivative action brought in behalf of Chrysler Corporation. The settlement approved disposed of two stockholders' derivative actions which had been consolidated for the purpose of settlement. In the two actions 17 separate causes of action, involving in all 70 separate claims, were asserted against 97 individual and corporate defendants.

The causes of action may be divided into three classifications: (1) charges that certain officers of Chrysler had personally profited from transactions between Chrysler and suppliers in which they had a financial interest; (2) charges that some of the defendants as officers and directors had mismanaged Chrysler from 1956 to 1961, and (3) charges that the Incentive Compensation Plan of Chrysler and its Stock Option Plans were not soundly devised, and were unfair to Chrysler's stockholders.

Prior to the agreement of settlement the plaintiffs had conducted fairly extensive discovery proceedings, and agreed to the terms of the settlement only on the condition that they be permitted further discovery in order to determine whether or not the claims asserted in the complaints had sufficient merit to demonstrate the unfairness of the proposed settlement. Additional discovery was allowed which thereafter proved to be elaborate. The final

result was that plaintiffs concluded that, except for the cause of action based upon the unfairness of the Incentive Compensation Plan, no cause of action set forth in the complaints could be successfully prosecuted to recovery because of the lack of probative evidence.

Accordingly, plaintiffs represented to the stockholders i nthe notice calling a stockholders meeting to approve the proposed settlement that, with the exception of the cause of action based upon the Incentive Compensation Plan, there was no possibility of recovery in any substantial amount for the benefit of Chrysler and its stockholders.

Thereafter, the stockholders, at the special meeting called for the purpose, overwhelmingly approved the proposed settement and a modification of the Incentive Compensation Plan which was part of the proposed settlement.

In addition, following the stockholders meeting the Chancellor appointed an *amicus curiae* to report to him on the relevant issues to be tendered at the hearing on the proposed settlement, and as to proof which would be of assistance to him in passing on the fairness of the settlement. The *amicus* filed an elaborate report with the Chancellor analyzing the evidence of record and suggesting other areas in which additional proof might be desirable.

Subsequently, an extensive hearing upon the fairness of the proposed settlement was held before the Chancellor. He ultimately approved the settlement. From his judgment of approval these appeals are taken by various objecting stockholders who had appeared at the hearing before the Chancellor to oppose the settlement.

Fundamently, the settlement agreed upon by the parties and approved by the Chancellor provides that the actions herein be dismissed with prejudice and releases be delivered to the defendants, with the exception of the defend-

ant Newberg, and, in return, that the Chrysler Incentive Compensation Plan be amended by stockholder action to accomplish what both plaintiffs and defendants say is a better Incentive Compensation Plan than that formerly in effect.

These appeals were taken only by certain stockholder objectors appearing at the hearing upon the settlement. None of the plaintiffs have appealed but appear in this Court as appellees along with the defendants. Only one of the objectors, viz., Ezzes, attacks the approval of the settlement on the ground that some of the causes of action asserted in the complaints are not in fact worthless but, to the contrary, offer hope of substantial recovery for the benefit of Chrysler.

We first consider the arguments made by the appellant Ezzes that certain of the causes of action offer hope of substantial recovery for the benefit of Chrysler. In doing so, however, we consider only those specific causes of action brought to our attention by Ezzes in his brief and at the argument.

First, Ezzes argues that the incentive compensation computations for the years 1955, 1957, 1960 and 1962 were made in violation of the Incentive Compensation Stockholders' Resolution of 1956. The argument is that nonoperating income was improperly included in consolidated net earnings of Chrysler for those years in order to compute the total amount payable as incentive compensation.

For the years in question the payment of incentive compensation was governed by the Stockholders' Resolution of 1956 authorizing the payment of incentive compensation not to exceed 5% "of the consolidated net earnings for that fiscal year (as reported in the Annual Report to the stockholders)."

In the computations in question all income of Chrysler resulting from its automobile business as well as from its investments, interest on loans, and profits from other sources were included in consolidated net earnings for the purpose of computing incentive compensation. Ezzes argues that the phrase "consolidated net earnings" used in the Resolution of 1956 necessarily excluded earnings from any source not connected with its main business venture, i.e., the making and sale of automobiles. It is argued that the improper inclusion of the so-called nonoperating income for the years in question resulted in an increase in incentive compensation of slightly over $2,000,000 which may readily be recovered from the defendants.

The Resolution of the Stockholders of 1956 does not exclude in terms so-called nonoperating income, but refers generally to "consolidated net earnings." Chrysler is actually a diversified business and has earnings arising from other than the manufacture and sale of automobiles. It has earnings derived from its Air-Temp, Missile, Defense and Space Divisions which are non-automibile sources, and from some other diversified sources such as catering service, vending machines in its plants, etc.

If the stockholders intended to exclude income from sources other than the manufacture and sale of automobiles from the Incentive Compensation Plan, that should have been made specific in the Resolution authorizing such payments. This follows from the provision in the Resolution that incentive compensation was to be based on the Annual Report to stockholders, which included earnings from all sources as consolidated earnings.

Ezzes, however, cites in this connection three cases which he argues control the question.

He cites *Schwartz v. Miner*, 37 Del. Ch. 575, 146 A. 2d 801. This case was a derivative action on behalf of a corporation which had a Profit-Sharing Trust Plan providing for contribution by the corporation of a percentage of its consolidated net profits. The corporation made an investment in the stock of a supplying company which it later sold at a loss. In determining later the amount to be distributed under the Profit-Sharing Plan, the loss thus occasioned was not deducted from the net profits. The Chancellor held that the corporation under the Plan was not required to deduct the net loss from the sale of capital assets in determining the amount to be distributed.

The case, however, does not stand for the proposition for which Ezzes cites it. The Plan involved in the *Schwartz* case provided for a contribution by the corporation to the Profit-Sharing Trust of a percentage of "consolidated net profits * * * exclusive of capital gains or losses." We think the Chancellor approved the exclusion of the capital loss from the computation of consolidated net profits of the corporation by reason of the precise exclusion in the Plan, itself and not upon any theory that consolidated net earnings of necessity must be exclusive of so-called nonoperating income.

Ezzes also cites *Lieberman v. Becker*, 155 A. 2d 596. We think, however, this case has nothing to do with the problem. It dealt with an attack upon a Deferred Compensation Unit Plan ultimately upheld by this Court. That Plan, however, was tied directly to the market price and dividends, upon the corporation's stock. We see no connection between the rule announced in the *Lieberman* case and the cause of action now under consideration.

Finally, on this point Ezzes cites *Heller v. Boylan*, 29 N. Y. S. 2d 653, aff'd 263 App. Div. 815, 32 N. Y. S. 2d 131. This case, we think, is equally inapposite to the one before us. In it the Court construed the term "net profits" used in a bylaw providing for the payment of incentive bonus. The bylaw in question defined "net profits" as the "net earnings made by the company in its business as a manufacturer and seller of tobacco and its products." The Court in *Heller* clearly reached its decision upon the conclusion that if non-tobacco earnings of the company had been intended to be included, the bylaw would have been worded differently.

Thus, it is, we think, that with respect to this particular cause of action the contention of Ezzes that substantial recovery could be made on it is erroneous. To the contrary, we think no recovery could be obtained as a result of trial.

The next cause of action said by Ezzes to have the probability of ultimate substantial recovery is that in 1962 the sum of $884,000, made up of state and local taxes, was included in net earnings. It is argued that this was illegal because this item was not reported in the 1962 Annual Report to stockholders as required by the Resolution governing Incentive Compensation Plans.

The figure $884,000 is arrived at as the difference between $60,700,000 reported as "Taxes on Income" in the 1962 Annual Report to Stockholders, and $61,584,000 included as "Taxes on Income" in the computing of incentive compensation for 1962.

It is therefore argued that since only those amounts reported in the Annual Report to stockholders could be included in the computation of incentive compensation, and

since the $884,000 was not reported in the Annual Report, it was clearly improperly included in the incentive computation and the directors are accordingly liable.

Initially, it is to be observed that the sum of $884,000 included in the 1962 computation is in fact the total of state and local income taxes paid by Chrysler. Prior to 1942 these figures were included by Chrysler's accountants with Federal income taxes but, thereafter, were not so included because the amounts did not again become significant until 1962 after the decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, upholding th rights of states to levy income taxes on companies engaged in interstate commerce.

Following this decision, Chrysler's auditors sought the advice of counsel as to whether or not to take such taxes into account in computing incentive compensation.– This action was taken in accordance with the 1956 Resolution which authorized the auditors in the computation of incentive compensation to rely upon the opinion of counsel as to any matter of law.

The question therefore as to the propriety of including $884,000 in the computation of incentive compensation for the year 1962 depends solely on whether or not these figures were contained in the Annual Report to stockholders for that year. As a matter of fact, the Annual Report to stockholders of 1962 does in fact contain the figures making up this sum, although they are included under different headings in the Annual Report. We are accordingly of the opinion that the Chancellor was correct in holding as he did that this asserted cause of action had no probability of substantial recovery.

Next, Ezzes argues that the cause of action based upon an alleged violation of the 1929 Incentive Compensation

Resolution of Stockholders for the years 1953 and 1955 has substantial probability of recovery.

The 1929 Resolution of Stockholders providing for incentive compensation, later superseded by the 1956 Resolution, provided that incentive compensation may be paid not in excess of 5% "of the net earnings of the corporation for that year." It is argued, citing *Heller v. Boylan, supra,* that the clear and unambiguous terms of this Resolution prevented the payment of incentive compensation for the years in question out of "consolidated earnings" of the corporation, but that this in fact was done in 1953 and 1955.

However, from 1929 on, the earnings of the corporation were always reported to stockholders as consolidated earnings. We think this continued practice clearly indicates that the intention of all concerned was that the 1929 Resolution referring to "net earnings" in fact meant "consolidated net earnings." Under the circumstances, it is proper to define the phrase "net earnings" as "consolidated net earnings." *Meyers v. Cowdin,* 47 N. Y. S. 2d 471, aff'd 270 App. Div. 827, 60 N. Y. S. 2d 129 aff'd 296 N. Y. 755, 70 N. E. 2d 555, and *Diamond v. Davis,* 62 N. Y. S. 2d 181.

We think this cause of action is at best of doubtful merit.

Ezzes next argues that the cause of action charging invalidity of stock options issued after 1956 in violation of the 1956 Incentive Compensation Resolution is meritorious and has promise of substantial recovery against the defendants on behalf of the corporation.

The argument in this respect is that since the Stockholders' Resolution of 1956 limited all Incentive Plans to 5% of consolidated net earnings, necessarily no stock options could have been issued if the full 5% had been paid out as incentive compensation. It is argued that the granting of stock options falls within the meaning of the words

"Incentive Plans" as used in the Stockholders' Resolution of 1956.

Without laboring the issue, however, we are of the opinion that the limitation of a percentage of consolidated net earnings under the Stockholders' Resolution of 1956 has no bearing on the issuance of stock options. This is made clear by a comparison of the Stockholders' Resolution of 1929 with that of 1956. The 1929 Resolution authorized the Board to establish Profit-Sharing Plans and to provide for Bonus Plans. In 1956 the 1929 Resolution was amended to permit the Board to provide plans for officers and executives of the corporation "to share in the profits of the corporation (hereinafter in this Resolution called Incentive Plans)." It seems plain therefore that the 1956 Resolution substituted the phrase "Incentive Plans" for the former phrases of "Profit-Sharing Plans" and "Bonus Plans." This being so, it is apparent that the amendment was not intended to include Stock Option Plans which, ordinarily at least, are not Profit-Sharing or Bonus Plans but are plans designed to permit the optionees an opportunity to acquire a share in the corporation, itself.

Furtheremore, the Stock Option Plan of the corporation was approved by the stockholders in 1952 and had at that time no relation to the Incentive Plan of 1929, nor did it acquire any by the subsequent amendment of that Plan in 1956.

Accordingly, we are of the opinion that this cause of action is without merit.

Next, Ezzes argues that the cause of action charging the directors with the wasting of corporate assets by causing the stockholders to cancel stock options previously granted and granting new options at a lower option price is meritorious and has the probability of substantial recovery.

In 1958 the Stock Option Committee of non-eligible directors granted, subject to stockholder approval, new options to purchase stock at around $50 per share on condition the holders of options previously issued at $61 to $77 per share were surrendered for cancellation. The Board recommended the proposal to the stockholders. It is argued that this aciton constitutes a waste of corporate assets.

It appears to us that the provisions of the Plan authorizing the issuance of options in 1959 comply with the requirements laid down by Delaware Law for the validity of Stock Option Plans. Indeed, no serious contention is made to the contrary.

The argument of Ezzes under this heading seems to be that a corporation should not permit the cancelation of old options and the issuance of new stock options at lower prices since that, in effect, excuses poor performance by management. Certain magazine and Law Review articles are cited to this effect and, indeed, we may assume that, as an ordinary business practice, such action is undesirable. This does not alter the fact, however, that under the law of this State a Stock Option Plan may not be successfully attacked when the options are granted by a disinterested committee with the approval of the directors and stockholders, and where the optionee is required to remain in the employ of the corporation. *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57; *Beard v. Elster*, 160 A. 2d 731. The new Option Plan meets these tests.

We are of the opinion that this cause of action has no merit.

Finally, Ezzes argues that the cause of action based upon the cost to Chrysler of a revolving credit commit-

ment is meritorious and has probable recovery of in excess of $2,000,000.

The facts underlying this alleged cause of action are that in 1958 Chrysler obtained a revolving credit commitment for $150,000,000 which was continued until 1961. Chrysler never used the revolving credit but its existence cost Chrysler $2,157,533 from 1959 to 1961.

The credit commitment was recommended by the Finance Committee in 1958 of which there were nine members, seven of whom were directors of banks later participating in the credit commitment. Prior to this action Chrysler's Administrative Committee, the members of which were all full-time employees of Chrysler, approved the establishment of the credit commitment. On the same day, the Board of Directors—18 of the total of 21 being present—approved the credit commitment arrangement. Of the 18 directors voting, eight were officers or directors of banks later participating in the revolving credit commitment.

Ezzes argues that the action of the Finance Committee and the Board of Directors was illegal as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and Article II, Section 9 providing that no director shall vote upon a matter in which he is interested.

It appears that the reasons leading to the arrangement of the revolving credit commitment are that in 1953 it was clear to the directors that Chrysler fased heavy cash demands due to the requirements to be caused by major model changes in 1959 and 1961; the entry into the compact car field; increased emphasis on international operations and a slowdown in Government payments for defense products, all of which would probably require addi-

tional cash. In addition, in 1958 it had become obvious that Chrysler's financial fortunes had begun to deteriorate and that its sales were severly contracting.

Accordingly, on the basis of this estimate of Chrysler's prospects the revolving credit arrangement was approved. The agreement was between Chrysler and the Hanover Bank as agent, of which McNeill, one of Chrysler's directors, was president. However, it appears that the Hanover Bank had been selected by two independent officers of Chrysler as agent, and that it had agreed to serve without compensation.

Furthermore, at the time the revolving credit agreement was authorized, no bank other than the Hanover Bank had been selected as a participant in the agreement. As a matter of fact, Simons, Chrysler's treasurer, selected the banks to participate, allocated their shares of the participation, and later reported that fact to the directors.

Thereafter, from 1958 to 1961 the advisability of terminating the credit agreement was reviewed frequently and, in the unanimous opinion of the Board of Directors until 1961, it was continued as advisable for the good interests of Chrysler.

The Chancellor found that the evidence of record discharged the burden of proof lodged upon the directors of proving that the commitment was reasonably necessary as a matter of business judgment for the purpose it was tended to serve, and that, accordingly, the technical by-law violation, if indeed there was one, imposed no liability upon the directors since there was no showing at all of any loss to Chrysler or of any pecuniary benefit to the allegedly interested directors.

We agree with the Chancellor that this cause of action is essentially an attack upon a decision involving the exercise of business judgment on the part of the directors. In the absence of a showing of bad faith or fraud, of which there is none in this record, recovery on this claim is at best of extremely doubtful probability. *Keenan v. Eshleman*, 23 Del. Ch. 234, 2 A. 2d 904; *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 82, 90 A. 2d 660; *Stering v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A. 2d 107.

There were other causes of action argued by Ezzes to the Chancellor below, all of which were held by the Chancellor to be of extremely doubtful merit. Ezzes has not in this Court renewed his argument with respect to these other causes of action. We therefore are not required to consider them.

With respect to the causes of action urged upon us as containing probability of substantial recovery and, thus, a reason for disapproval of the settlement, we agree with the appraisal of them made by the Chancellor to the effect that the evidence produced in the record in support of these claims is wholly inadequate to afford any hope of substantial recovery upon them. Therefore, they may properly be described as devoid of merit or, possibly as some of the parties label them, worthless.

Of all of the claims asserted against these defendants, the only one considered to have any possibility of ultimate recovery was the one based upon the alleged unfairness of the 1956 Incentive Compensation Arrangement. All of the parties before us agree that this is the fact with the exception of the appellant Ezzes and the plaintiff-appellee Dann, whose position will be referred to later.

Under the 1956 Plan, incentive compensation awards were permitted to be made for years when the consoli-

dated net earnings of Chrysler and its subsidiaries, computed before the payment of taxes on income and before the payment of incentive compensation and interest as long term debt of the corporation, surplus and retained earnings of Chrysler and its subsidiaries and the long-term debt of Chrysler. The total award for any one year was limited to 5% of such excess. There was no provision limiting the fund to be paid as incentive compensation in any one year to the amount of dividends declared in that year.

The charge of unfairness with respect to the 1956 Plan is that it was wasteful in that it permitted the payment of more in the way of incentive compensation than do comparable Plans of Chrysler's competitors; that the Plan does not limit the payment of incentive compensation only to years when corporate income exceeds a reasonable return on the stockholder's investment; and that the Plan requires a so-called "set-aside" for the benefit of stockholders of only 7% of the stockholders' investment before taxes which after the payments of taxes, is the equivalent of about 3½%. All of this means, it is argued, that the Plan is unfair because the stockholder's return on his investment is too small in comparison with the incentive compensation permitted to be paid.

The Chancellor concluded that the attack on the Plan as outlined above raised an issue of fairness upon comparison of the return on the stockholder's investment with the amount of incentive compensation that could be paid. He therefore concluded that an issue as to the fairness of the 1956 Plan remained in the case, even though his appraisal of the other causes of action in effect was that they were worthless.

Accordingly, the parties agreed upon a settlement as to the only remaining issue, that of fairness of the Plan. As a part of that settlement they proposed the adoption of a new Incentive Compensation Plan to be submitted to the stockholders for their approval upon the understanding that a vote for its approval was a vote in favor of the agreed-upon settlement. As we have pointed out, the stockholders overwhelmingly approved both the new Compensation Plan and the settlement.

The new Plan of 1963 briefly is as follows: The period within which it is to operate is 1963 through 1969. It provides that incentive compensation may be paid only when the consolidated net income after taxes, as reported in the Annual Report to stockholders, plus provision for incentive compensation plus interest on the long-term debt of the corporation, is greater than 5½% of the stockholder's investment—that is, capital, surplus and retained earnings plus the corporation's long-term debt. The total amount that may be awarded as incentive compensation is limited to the lower of 12% of the excess or the aggregate amount of all dividends paid upon the common stock for the year in question.

The adoption of the new Plan resulted in changing the Incentive Compensation Plan of Chrysler from a before-tax to an after-tax basis. It increased the after-tax set-aside from 3½% under the old Plan to 5½% under the new Plan, thus increasing the benefit to the stockholder's investment. The new Plan increases the percentage rate of incentive compensation computed after the increased set-aside for the benefit of stockholders. The result is that the Plan requires higher earnings before any award of incentive compensation may be made.

Until the earnings for a particular year reach the so-called "cross-over" point—that is, the amount of earn-

ings which would make the fund for incentive compensation the same under both the old and new Plans—the result would be a smaller amount available under the new Plan to be awarded as incentive compensation. After the cross-over point is reached, however, a larger amount would be available for such purposes under the new Plan than would have been under the old. In addition, an increase in earnings in each succeeding year increases the amount of the set-aside so that higher earnings are required in each succeeding year to continue an increase in the amount awarded as incentive compensation.

It is obvious that the settlement with respect to the Compensation Plan has resulted in the increase of the set-aside for the benefit of stockholders before the payment of incentive compensation. This automtically increases the total amount of earnings required before incentive compensation can be paid.

The defendants argue it is really immaterial whether the change in the Compensation Plan is a benefit to Chrysler Corporation. They argue that the settlement should be approved for the reason that the necessity of defending the worthless claims asserted against the defendants would prove an expensive and unreasonable burden upon Chrysler Corporation by reason of the cost of the defense and the wastage of time which would be required of Chrysler's officers and executives. Indeed, this seems to us to be an apparent fact.

The Chancellor concluded that his function was to determine whether or not the terms of the settlement are fair to Chrysler Corporation when set against the probability of recovery on the asserted claims against the other defendants. These are, of course, theoretically asserted for the benefit of Chrysler Corporation.

He concluded that while both the old Plan and the new Plan were probably fair and would be upheld against attack, he could not and should not determine which of the two was the better from the point of view of Chrysler. He pointed out that the new Plan does in fact require higher earnings, up to a certain point at least, in order for the same amount to be paid as incentive compensation as would have been permitted under the old Plan. Recognizing that no one could predict the future of Chrysler accurately, he reached the conclusion that in the long run the new Plan would probably result in increased benefits to the stockholders of Chrysler.

Accordingly, under all the circumstances, he approved the settlement subject to the limitation that no director of Chrysler should receive benefits under the Plan for the year 1963. This limitation was imposed because of the greatly increased earnings of Chrysler for the year 1963 which probably were known or could have been forecast by the Chrysler directors entitled to benefit under the Plan.

It is this determination of the Chancellor we are to review in these appeals. Our function in the review of such matters is not to determine for ourselves the intrinsic fairness of the settlement in the light of our business judgment. Our function is solely to determine whether or not the Chancellor in the approval of the settlement has abused his business judgment to an extent amounting to an abuse of judicial discretion. *Rome v. Archer*, 197 A. 2d 49; *Kleinman v. Saminsky*, 200 A. 2d 572.

Initially it is obvious that the settlement approved in this litigation does not take the traditional form of the payment of a *quid pro quo* by the defendants. The reason for this is obvious. Such a payment would be nothing

more than a buying-off of the plaintiffs for the dismissal of worthless claims. It is, we think, generally conceded that such a practice is an undesirable one to ask a court to approve. In fact, Rule 23(c) of the Court of Chancery under which this settlement was approved was, we think, specifically designed to end a practice prevalent theretofore to this effect. See 3 *Moore's Federal Practice* (2d Ed.), ¶23.24[2].

Nevertheless, on the record before us the Chancellor concluded, and we agree with his conclusion, that the causes of action, with one possible exception, were, if not worthless, at least incapable of sufficient proof to hold out much hope of recovery. With respect to the one cause of action about which there could be some argument, the parties have agreed upon, and the Chrysler stockholders have approved, an adjustment which probably will result in a long-term benefit to Chrysler.

Accordingly, we think it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was an harassment of Chrysler, to approve a settlement which departs from the traditional form. Each case, of necessity, must be decided upon its peculiar facts. Under the peculiar facts of this case this settlement is fair and results in the ending of this prolonged and harassing litigation. We think it should be approved.

The appellant Koenigsberg, an objector, argues that the settlement should be disapproved because in effect the stockholders, themselves, are making the payment of settlement through the media of increased incentive compensation payments. We think the argument confuses the facts of the result. Certainly, it is to the benefit of Chrysler stockholders to end this litigation. There is no hope of substantial recovery for their benefit by the continuance

of the litigation, but there is assurance of cost to them in the event it is prolonged. Furthermore, it is at least arguable that the new Incentive Compensation Plan in the long run will benefit the stockholders of Chrysler by reason of the increased requirements of the so-called set-aside.

It seems to us to make little difference under the circumstances of this litigation that the individual defendants who receive releases as a part of this settlement have in fact made no monetary payment in settement. This, we think, necessarily follows from the fact that the claims asserted against the individual defendants have been found to be devoid of merit. Despite this, they cannot end the litigation. The claims are pleaded with technically legal sufficiency and, thus, are not subject to a motion to dismiss.

Nevertheless, if the claims are prosecuted the expense of defense will fall upon Chrysler Corporation which, in the last analysis, is the Chrysler stockholders. We think, therefore, that while on its face plausible, the argument of Koenigsberg is not sufficient cause to us to interfere with the exercise of the discretion of the Chancellor.

The appellants, Sandler objectors, argue that the settlement should be disapproved because it confers no benefit upon Chrysler and because, for the year 1962, the amount which may be awarded as incentive compensation under the new Plan is some $1,500,000 in excess of that which could have been awarded under the old Plan. The argument is, of course, primarily based upon the fortuitous circumstance that Chrysler's earnings for 1963 were greatly larger than for 1962. While the directors and officers of Chrysler may have realized the potentially greater earnings for that year, that fact has been taken care of by the Chancellor in the condition he imposed upon his approval of the settlement, that such persons not share in the incentive compensation award for 1963.

A further answer to these objectors' argument is that, in all probability, over the long span of the future, the Plan in its operation will resultt in benefit to Chrysler's stockholders. Admittedly, no one can predict Chrysler's future earnings but, certainly, in a business such as the authomobile industry, profits take their ups and downs and may well equalize themselves over a course of years.

The objector Ezzes makes a final point to the effect that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained.

He pointsout that of the directors present at the meetings of February 7, 1963 and March 21, 1963, which resulted in the recommendation of the Plan to the stockholders, all but two on February 7, and all but four on March 21, were either recipients of incentive compensation or defendants in these actions, or both. Upon this fact, it is argued that the Board's action in approving the settlement, including the amendment to the Plan, was invalid as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and as a violation of Article II, Section 9 of the bylaws providing that no director shall vote upon a matter in which he is interested, or be present when the vote is taken.

Ezzes overlcoks the fact that the action of the directors did not bind Chrysler to the amendment in the Compensation Plan since, under the then-existing Plan, the sole method of change was by stockholder action. The most the directors could do in this respect was to submit to the stockholders the proposed change. This is what was done. Whether or not, therefore, there was some legal defect in the directors' action, that defect could be cured by informal stockholder action. *Kerbs v. California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652.

Ezzes says, however, that there was no effective stockholder action because a fair disclosure of the facts was not made to the stockholders in that they were not informed of the future profit potentials of Chrysler and the resulting possibility of payment of greatly increased incentive compensation under the amended Plan. He charges that before April 16, 1963, the date of the stockholders' meeting, the directors knew that the new Plan would produce a substantially greater fund for incentive compensation for 1963 than would the old Plan; that there had been general public acceptance of Chrysler's 1963 model; that sales and earnings figures pointed to an outstanding year for Chrysler, and that general conditions known to the automobile industry indicated that the industry would have an outstanding year in 1963. The failure to include this information in the proxy material and the notice of settlement hearing, it is asserted, constituted a breach by the directors of their duty to make a full and frank disclosure to stockholders.

It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.

In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan. The Chancellor, however, imposed as a condition upon his approval of the settlement the requirement that no director-defendant shall receive greater benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection.

All of the plaintiffs, with the exception of the plaintiff Dann, named as appellees in these proceedings, argue for the approval of the settlement. They advance two reasons in support of their position, one of which we have followed for our approval of the settlement. Their second reason is that the main benefit of the litigation now settled was to effect a change in management in Chrysler Corporation which has resulted in its greatly improved financial position.

We are of the opinion that the second reason, if it is entitled to any consideration—a question upon which we refuse to express an opinion—is entitled to consideration only in connection with the application for fees, as to which the Chancellor has reserved decision.

Finally, the plaintiff Dann, an appellee before us, has filed a brief and was permitted to argue orally in opposition to the approval of the settlement.

Some of the other appellees filed a motion to strike the brief of Dann on the ground that he had no standing before us to argue in opposition to the Chancellor's judgment since he had not taken an appeal therefrom. We think the position taken by these appellees is correct and that the plaintiff Dann, appellee here, has no standing to argue in opposition to the judgment below. Cf. *Cleaver v. Roberts*, 203 A. 2d 63; *Trans World Airlines, Inc. v. State ex rel. Porterie*, 183 A. 2d 174; *Casey v. Southern Corp.*, 26 Del. Ch. 447, 29 A. 2d 174. The brief of the appellee, Sol A. Dann, is accordingly ordered struck from the record.

By reason of all of the foregoing, the judgment of the Chancellor approving the settlement of this litigation is hereby affirmed.

EXHIBIT M

ORDER OF THE SUPREME COURT OF DELAWARE DENYING REARGUMENT

And now, to-wit, this 4th day of December, A. D. 1964, it is

ORDERED:

1. The petions for reargument of plaintiff Sol. A. Dann and the plaintiffs below in Civil Action No. 1330 except Sol A. Dann, and the petition of the appellant Koenigsberg, are hereby denied:

2. The costs outlined in the certificates of the defendants below and the plaintiffs below except Sol A. Dann for printing the appendices pursuant to Rule 25(3), are hereby taxed against the appellee Chrysler Corporation.

/s/ Daniel F. Wolcott J.
/s/ James B. Carey J.
/s/ Albert J. Stiftel J.

EXHIBIT N

In the Supreme Court of the State of Delaware

HASTINGS PETITION FOR REARGUMENT

Come now Plaintiffs Below in Civil Action No. 1330 Appellees, except Sol A. Dann, and respectfully petition the Court for reargument of the Opinion of the Court dated November 17, 1964, upon the following grounds:

1. The Supreme Court Opinion stated (pages 2-3) as follows:

> "Prior to the agreement of settlement the plaintiffs had conducted fairly extensive discovery proceedings, and agreed to the terms of the settlement only on the condition that they be permitted further discovery in order to determine whether or not the claims asserted in the complaints had sufficient merit to demonstrate the unfairness of the proposed settlement. Additional discovery was allowed which thereafter proved to be elaborate. The final result was that plaintiffs concluded that, except for the cause of action based upon the unfairness of the Incentive Compensation Plan, no cause of action set forth in the complaints could be successfully prosecuted to recovery because of the lack of probative evidence."

The fact is that while plaintiffs had conducted some investigation on their own, they had been prevented by Court

Order from taking discovery prior to the commencement of settlement negotiations. Limited discovery was agreed to by defendants in connection with the contemplated settlement. Any statements concerning evidence were confined to the state of the record established by the limited discovery and did not undertake to state what might develop in the event that the causes of action should proceed to trial.

2. The Supreme Court stated (page 3) as follows:

> "Accordingly, plaintiffs represented to the stockholders in the notice calling a stockholders' meeting to approve the proposed settlement that, with the exception of the cause of action based upon the Incentive Compensation Plan, there was no possibility of recovery in any substantial amount for the benefit of Chrysler and its stockholders."

The notice which was sent to the stockholders by Chrysler Corporation pursuant to this Order of the Chancellor set forth *the state of the admissible evidence which had been developed up to that point, and did not consider the probability of developing other evidence in the event that litigation should be pursued. The plaintiffs below did not and have not admitted or agreed that the claims were "worthless". Moreover, plaintiffs have always taken the position that in view of the change in management at Chrysler, it was in the best interest of the Company to settle the litigation rather than prosecute the claims through involved and costly litigation which would distract Chrysler personnel from corporate activities.*

3. The Supreme Court opinion stated (page 17) as follows:

> "He [The Chancellor] therefore concluded that an issue as to the fairness of the 1956 Plan remained in

the case, even though his appraisal of the other causes of action in effect was that they were worthless."

The Chancellor, in evaluating the proposed settlement, concluded "that the probability of success in litigating any such claims is so remote as to entitle them to practically no consideration". Moreover, the Chancellor, in his Opinion dated March 4, 1964 stated "In discharging its function of evaluating the value of the settlement, the court would not directly determine the merits of the litigation." The Chancellor did not hear the matter on its merits and did not state that the claims were "worthless".

4. The Supreme Court opinion stated (page 21) as follows:

> "Initially it is obvious that the settlement approved in this litigation does not take the traditional form of the payment of a *quid pro quo* by the defendants. The reason for this is obvious. Such a payment would be nothing more than a buying-off of the plaintiffs the dismissal of worthless claims. It is, we think, generally conceded that such a practice is an undesirable one to ask a court to approve. In fact, Rule 23(c) of the Court of Chancery under which this settlement was approved was, we think, specifically designed to end a practice prevalent theretofore to this effect. See *3 Moore's Federal Practice* (2d Ed.), §23.24(2)."

The above quoted language presupposes (1) that the claim was in fact worthless and no dispute could even exist as to the lack of merit of the claims which would warrant compromise of the claims; and (2), that any payment by defendants would go to the plaintiffs. Since this

is a derivative action, the payment would be made to the corporation. The protective feature of Rule 23(c) is to assure that the corporate claims would not be lost by inadequate consideration or by a deal with the plaintiff.

In this case the settlement is not attacked on the ground that the considertaion for the release of the corporate claims is too small or that the plaintiffs will receive some special benefit at the expense of the rights of the corporation.

5. The Supreme Court Opinion stated (at page 21) as follows:

> "Nevertheless, on the record before us the Chancellor concluded, and we agree with his conclusion, that the causes of action, with one possible exception, were, if not worthless, at least incapable of sufficient proof to hold out much hope of recovery."

The Chancellor stated "Common sense, it seems to me, would dictate that where the hope of recovery on the part of the plaintiffs and thus on the part of the corporation, is small, little can be demanded from the defendants by way of settlement. Certainly this is the case here." In his Opinion dated March 4, 1964, the Chancellor stated "in discharging its function of evaluating the fairness of the settlement, the court did not directly determine the merits of the litigation."

Wherefore, based upon the grounds hereinbefore set forth, plaintiffs below in Civil Action No. 1330, Appellees, except Sol A. Dann, respectfully pray that this Court grant reargument upon the Opinion of this Court dated November

17, 1964, or in the alternative, that this Court modify said Opinion consistent with the foregoing grounds. (Emphasis supplied.)

Danial O. Hastings,
Hastings, Taylor & Willard,
Attorneys for Plaintiffs Below in Civil Action No. 1330, Appellees, except Sol A. Dann.

Dann, Rosenbaum, Bloom & Kaufman,
Except Sol A. Dann,
1820 David Stott Building,
Detroit 26. Michigan.

I hereby certify that the above petition for reargument is presented in good faith and not for delay.

Daniel O. Hastings,
Hastings, Taylor & Willard,
Continental American Building,
Wilmington, Delaware.

EXHIBIT O

In the Supreme Court of the State of Delaware

(DANN) PETITION FOR RE-ARGUMENT

Now comes plaintiff, Sol A. Dann, in pro per, and respectfully petitions this Honorable Court for a re-argument of the Opinion of this Court and all matters involved herein upon the following grounds:

1) The Opinion of this Court is contrary to the best interests of the stockholders.

2) The Opinion contains statements and characterizations concerning the merits of these causes of action that are unwarranted, contrary to the record, and contrary to the findings and Opinion of the Chancellor.

3) That before this suit was instituted, Chrysler Corporation was riddled with corruption. That in referring to these cases as "worthless", "without merit", and "no possibility of recovery", etc., the Court ignored the fact that the files and records in this case indicate that the actions commenced by this plaintiff were responsible for:

(a) Former President Newberg agreed to pay back $450,000 because of his wrongdoing and his options on stock worth several million dollars were likewise cancelled; and his partner, Mr. Stone, paid back $175,000.

(b) Former Chairman Colbert was removed, his salary reduced from $250,000 to $50,000 and his option on 35,000 shares of stock worth several million dollars was also cancelled;

(c) Over five vice-presidents were removed because of corruption, conflicts of interest or other acts of wrong-doing and their valuable options on stock worth in the aggregate untold millions, were likewise cancelled.

(d) Many superintendents, purchasing agents, managers of plants and other officials were also fired because of conflicts of interest, corruption and wrongdoing.

(e) Over 7,000 unnecessary white-collared employees were fired.

(f) An Ethics Committee was appointed and a code of ethics was adopted to remove, and to prevent the continuance of these acts of corruption.

(g) The Board of Directors itself was re-organized in order to make the number of outside directors greater than those on the inside.

(h) The entire policy of the corporation was changed and Chrysler notified the stockholders and public that the *new management* had changed from its former ways and were doing a job and intended to continue doing a job to "fix what's wrong, keep what's right and move ahead."

(i) The change in policy and change in management that reduced its unnecessary costs of operation, enabled Chrysler to enjoy the benefit of increased earnings in over one hundred million dollars per year. The benefit to its stockholders has been four-fold.

4) The Opinion of this Court ignores many areas of corruption on the part of many individual defendants who violated their fiduciary obligations to the corporation and its stockholders and liability of those defendant directors who permitted acts of corruption to continue. They were liable in damages in untold millions to the corporation for malfeasance and misfeasance and for violating their fiduciary duties and obligations as directors, regardless of whether or not they personally had their "hands in the till" or personally had "conflicts of interest".

5) That the foregoing is briefly described or referred to in the record before this Court, but extensive and thorough depositions were *not* taken of all the wrongdoing defendants nor of those witnesses who could have testified to the merits of plaintiff's causes of action.

6) That the Opinion is contrary to the evidence of record in this entire file and case and contrary to the information, leads to evidence and potential evidence that could have been converted into evidence to support the causes of action involved herein.

7) The merits of plaintiff's complaints were not fully inquired into and were not determined or adjudicated by the Court below, except in a superficial manner.

The type of "evidence" and depth of inquiry to support a "settlement" is far different from a judicial determination and trial "on the merits".

8) The purpose of these "settlement arrangements" and their implementation were, at the request of Chrysler, designed to *nolle prosequi* and not pursue this litigation despite the merits of plaintiff's causes for action, in order to help Chrysler restore its image, as described in this plaintiff's affidavit in support of counsel's petition for fees reference to which is hereby made for greater certainty.

9) That it was wrong and not in keeping with nor in the interests of "good" business judgment to dismiss meritorious causes of action against wrongdoing defendants without adequate contribution or consideration from them personally, except for the unusual circumstances and needs of the *new management* in this particular case.

10) On March 4, 1964, Chancellor Seitz filed his supplemental "unreported" Opinion, as ITEM 298 of CALENDAR ENTRIES before this Court in an attempt to prevent the present misunderstanding and in which he said:

"* * * IN DISCHARGING ITS FUNCTION OF EVALUATING THE FAIRNESS OF THE SETTLEMENT, *THE COURT DID NOT DIRECTLY DETERMINE THE MERITS OF THE LITIGA-*

TION. IT MERELY WEIGHED THE CLAIMS AND POSSIBLE DEFENSES IN ORDER TO ARRIVE AT A DETERMINATION AS TO WHETHER THE SETTLEMENT WAS FAIR. * * *"

"* * * TO REMOVE ANY DOUBT THAT THE COURT WAS MERELY APPROVING THE SETTLEMENT RATHER THAN DIRECTLY DECIDING THE MERITS OF THE LAWSUIT, *I WILL STRIKE FROM MR. CORROON'S PROPOSED INTERLOCUTORY AND FINAL ORDERS WHEREVER THEY APPEAR THE WORDS 'ON THE MERITS'* * * *" Pages 3 and 4 of OPINION (Emphasis is ours.)

11) *Despite this Opinion,* defendants stressed before this Court that which was stricken by the Chancellor, and from which *defendants did not appeal.* They seem to be of the opinion that Chancellor Seitz erred in this respect and that there is apparently a need to have a *judicial* finding that there was "no merit" to plaintiff's complaints against them before the Court would have the right to dismiss the litigation against them. It is now not clear, whether in affirming the opinion of the Chancellor, his "unreported" Opinion was affirmed.

12) That the widely scattered and uninformed and *misinformed* stockholders had no practical or reasonable opportunity to vote with full and "clear" knowledge and information of those facts necessary for them to have before voting intelligently.

13) That the files and records in this case contain a letter dated April 3, 1963 signed by counsel for plaintiff stockholders addressed to Richard F. Carroon with copies sent to the Chancellor and counsel for defendants. The letter which is attached hereto reads as follows:

"We do not agree with all the statements in your letter and *particularly with the statement that the Notice to Stockholders* is the plaintiffs' notice. It is our understanding that, in the last analysis, the notice is the Court's notice. In fact, at the time the notice was presented to the Court *we objected to certain changes proposed by you* and *the Order was signed without our agreement to the changes.* We also proposed certain changes in the Order at that time and they were denied. Also, at that meeting with the Court, we believe *it was the understanding of all present that plaintiffs' position would be stated in their petition.*

"The Notice was sent to the stockholders on order of the Court. It is signed by the secretary of Chrysler. Factually, the notice was proposed by counsel for the individual defendants and worked out in many sessions in their office. The notice finally submitted to the Court represents some *compromises* on both sides. *The position of plaintiffs is set forth in the petition and affidavits which were filed on April 1, 1963.*" (Emphasis supplied.)

14) That the word "evidence" was designed and used in the stockholders' notice to deceive and mislead the stockholders and convey an impression that was contrary to its commonly accepted and true meaning.

15) That the actions of the *amicus*, "objectors" and "intervenors" referred to in the Opinion, who never examined and investigated the potential evidence, were not designed to and did not set forth the wrongdoings on the part of the defendants according to the evidence introduced and those wrongdoings that could have been established by developing the potential evidence.

16) That the stockholders did not have adequate, appropriate and proper protection and representation of their rights and interests and the issues involved were not properly and adequately presented to the Court.

17) These causes of action were not "settled" on the basis of the merits of plaintiff's complaints.

18) That false and improper representations, undue influence and other improper pressures and methods were used to accomplish the dismissal of these cases and achieve the results of these settlement arrangements, that chiefly benefit wrongdoing defendants.

19) That various pressures, threats and insults were made to intimidate this plaintiff. Their constant desire from the outset to settle this litigation by way of dismissals, their negativism and failure to investigate information, their failure and refusal to proceed with proper depositions to a trial in these matters frustrated this plaintiff and his efforts, and caused this plaintiff to become subject to the will and undue influence and domination of his counsel, and counsel for defendants.

20) That the striking of this plaintiff's briefs was improper and contrary to his constitutional rights.

21) That the Opinion goes beyond the purposes sought to be accomplished by this so-called settlement arrangement; it goes beyond the understanding and agreement of the parties; it is contrary to the best interests of the corporation and its stockholders, and goes beyond the *unreported* Opinion of Chancellor Seitz.

22) That a re-argument and re-hearing is necessary to prevent a miscarriage of justice.

Based upon the grounds hereinbefore set forth and those set forth in this paintiff's Appendix, Briefs, and previous representations to this Court, this plaintiff, Sol A. Dann, respectfully prays that this Court grant a re-argument of all the matters involved herein and the Opinion of this Court dated November 17, 1964 or, in the alternative, that this Court modify said Opinion consistent with the foregoing grounds and his previous representations and requests.

Sol A. Dann,
Plaintiff, In Pro Per.

Dated: November 25, 1964.

I, the undersigned, Sol A. Dann, do hereby certify that the foregoing petition is presented in good faith and not for delay.

Sol A. Dann,
Plaintiff, In Pro Per.

Subscribed and sworn to before me this 25th day of November, 1964.

Wm. Appel,
Notary Public, Wayne County, Michigan.
My commission expires Dec. 18, 1967.

EXHIBIT ATTACHED TO DANN PETITION AS PART OF EXHIBIT O

April 3, 1963

Richard F. Corroon, Esquire
350 Delaware Trust Building
Wilmington, Delaware

Re: Dann, et al. vs. Chrysler, et al.
Del. Chancery 1330

Dear Mr. Corroon:

We refer to your letter dated March 27, 1963, in reply to the letter of Mr. Dann to Mr. Love dated March 20, 1963. We believe that your letter would not call for a reply from us except for the fact that copies of it were sent to this office and to Messrs. Dabney and Robinson.

We do not agree with all the statements in your letter and particularly with the statement that the Notice to Stockholders is the plaintiffs notice. It is our understanding that, in the last analysis, the notice is the Court's notice. In fact, at the time the notice was presented to the Court we objected to certain changes proposed by you and the Order was signed without our agreement to the changes. We also proposed certain changes in the Order at that time and they were denied. Also, at that meeting with the Court, we believe it was the understanding of all present that plaintiff's position would be stated in their positon.

The Notice was sent to the stockholders on order of the Court. It is signed by the secretary of Chrysler. Factually, the notice was proposed by counsel for the individual defendants and worked out in many sessions in their

office. The notice finally submitted to the Court represents some compromises on both sides. The position of plaintiffs is set forth in the petition and affidavits which were filed on April 1, 1963.

Very truly yours,

/s/ David O. Hastings
Hastings, Taylor & Willard

/s/ Lewis M. Dabney, Jr.
Lewis M. Dabney, Jr.

/s/ Herbert Robinson
Liebman, Eulau & Robinson
Attorneys for Plaintiffs

DOH/ak

cc: Honorable Collins J. Seitz
Aaron Finger, Esq.
S. Samuel Arsht, Esq

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ARTHUR HOFFMAN,
Petitioner,

against

CHRYSLER CORPORATION, *et al.*, and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

SOL A. DANN, *et al.* and
MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

HERMAN KOENIGSBERG and
VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 954, October Term 1964),
Objector below

No. 893

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

SUPPLEMENTAL BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS, IN REPLY AND OBJECTION TO BRIEF OF SOL A. DANN, PLAINTIFF BELOW

Sol A. Dann, an attorney and a party to the settlement made in the court of first instance filed in this Court on April 13, 1965 a purported "Brief of Sol A. Dann, Plain-

tiff Below, In Support of Petitions for Certiorari".* Dann has no standing to seek or urge certiorari at this time and Dann's brief should be disregarded and stricken by this Court for many reasons.

Admittedly, Dann, named as a respondent herein, has deliberately waited until after the expiration of both the time to file a petition for certiorari and the time for respondents to file briefs before he decided to submit anything to this Court, because as he says he "had hoped and relied upon 'objectors' to fully and accurately explain his position before the court" (DB 2). Dann's brief purports to be in support of petitions for certiorari filed by Hoffman in No. 893 and Ezzes in No. 954, but does not deal with the grounds asserted in those petitions, and instead discourses upon Dann's private "Frustrated . . . Predicament" and his personal problems in connection with the settlement, which turn upon certain of the findings in the decisions below and not upon the result (DB 15; RA 35-36; DB 11-12, 22; DBA 84, 87).

As a respondent, Dann could have filed a cross-petition for certiorari if he thought he had the standing and a federal basis for attacking the judgment below. But such a cross-petition had to be filed within 90 days from the entry of the judgment below and that time expired long ago. 28 U. S. C. § 2101(c). Dann has no more standing to attack in this Court the judgment below than he did in the Supreme Court of Delaware, which struck his similarly belated sub-

*Further references to numbered pages of the Brief of Sol A. Dann, Plaintiff Below in Support of Petitions for Certiorari, will be preceded by the abbreviation DB and to the Appendix annexed thereto by the abbreviation DBA. References to numbered pages of other appendices will be preceded by the following abbreviations: RA for Appendix of Certain Defendants Below, Respondents in Opposition in No. 893, Oct. Term 1954; DA for Appendix of Certain Defendants Below, Appellees filed in the Supreme Court of Delaware.

mission of a brief complaining of the judgment in the Court of Chancery, after the time to appeal had expired (DBA 75). Apart from its being procedurally ineffective, Dann's brief fails to specify or raise any federal question of substance. Moreover, it should also be stricken for failure to comply with Rules 23(1)(f) and 40(5) of this Court, particularly since it contains a large amount of irrelevant and scandalous matter. Finally Rule 23(3) of this Court stating that "No separate brief in support of a petition for certiorari will be received . . ." applies as well to an independently submitted brief of a private party as to a brief attached to a petition for certiorari.

STATEMENT

Dann was one of several plaintiffs who brought a stockholders' derivative suit on behalf of Chrysler Corporation in the Court of Chancery of Delaware in August, 1960. His deposition was taken and by court order he was required to produce all relevant papers which might support his charges (DA 287-301). The papers produced by Dann, which failed to sustain his causes of action, were made part of the record in the Court of Chancery. After further extensive discovery proceedings, a settlement was made with Dann, as well as other stockholder plaintiffs in the two stockholders' suits then pending in the Court of Chancery (DA 7-8). Dann's attorneys submitted to the Court of Chancery an order providing for a hearing to determine the fairness of the settlement and asking the court to approve a proposed notice of hearing to the stockholders (DA 340). With minor modifications the proposed notice was approved and was sent to the stockholders.

The notice submitted by Dann's attorneys contained their conclusions as to the merits of each claim to be settled. Dann thereafter objected to his attorneys' concessions as to

the lack of merit to the claims and was required to produce all of his files and to testify at the hearing of evidence on the fairness of the settlement (DA 377-388, 397-398). In his testimony, Dann testified in favor of the settlement and admitted that the notice was sufficient and that he had no other evidence that would throw any light on the charges (DA 413, 421). Dann's original charges, many of which he again reasserts, were fully explored by his attorneys in the discovery before the making of the settlement; they were again explored in discovery by other stockholders who appeared to object to the settlement; they were the subject of testimony and other evidence at hearings in the Court of Chancery, which examined them and found "little, if anything" to them; they were then reviewed by the Supreme Court of Delaware, which found them to be "devoid of merit" (DA 7-8; *e.g.*, RA 26-29; RA 58; DA 409, 421; RA 93; DBA 66).

Dann personally participated in the settlement negotiations and the settlement agreement was subscribed to by Dann's law firm on his behalf and, after the hearings on the fairness of the settlement, his law firm joined in a brief submitted in support of it (DA 422-24, DA 40). In his testimony at the hearings before the Court of Chancery, Dann personally supported the settlement (DA 413).

Until the decision of the Court of Chancery on December 31, 1963 which contained findings he found "embarrassing", Dann had no quarrel with the settlement (DA 431-32). In his complaint Dann had made serious charges against many responsible persons. The court found they had no substance. Thereafter, Dann modified his position regarding the settlement by taking exception to the findings on which the approval of the settlement was based and asked that the hearings be re-opened to re-explore his files and charges (DBA 32-37).

When questioned by the court on his application to reopen, Dann stated in open court that he did not repudiate the testimony he gave at the hearing (DA 438). The Chancery Court found no basis or need for any further hearings and denied Dann's application. It entered the final decree and judgment approving the settlement on March 9, 1964. Since Delaware law allows only 60 days from the date of judgment to appeal to the Supreme Court of Delaware, 10 Del. Code Ann. § 145 (Supp. 1962), the time to appeal expired on May 8, 1964.

Dann took no appeal. His own law firm again joined in a brief supporting the settlement and also the judgment below. However after the time to appeal had expired, Dann submitted by letter dated June 29, 1964 an "Appendix of Plaintiff 'Appellee' Sol A. Dann" and thereafter submitted a "Brief of Plaintiff, Sol A. Dann" dated August 29, 1964 to the Supreme Court of Delaware, attacking the judgment of the Court of Chancery. Since under well recognized Delaware practice one who has not taken an appeal cannot argue in opposition to the judgment below, certain defendants below moved to strike the "Brief of Plaintiff Sol A. Dann". Dann filed a "Reply of Sol A. Dann to Motion of Certain Defendants to Strike His Brief," in time for the consideration of the Supreme Court of Delaware prior to the day set for oral argument, September 21, 1964.

The Supreme Court of Delaware affirmed the judgment of the Court of Chancery approving the settlement in an opinion dated November 17, 1965 and entered November 18, 1965. In its opinion, the Supreme Court of Delaware granted the motion to strike Dann's brief in the following language (DBA 75):

> "Some of the other appellees filed a motion to strike the brief of Dann on the ground that he had

> no standing before us to argue in opposition to the Chancellor's judgment since he had not taken an appeal therefrom. We think the position taken by these appellees is correct and that the plaintiff Dann, appellee here, has no standing to argue in opposition to the judgment below [Citing Delaware cases]. The brief of the appellee, Sol. A. Dann is accordingly ordered struck from the record." 205 A. 2d at 355.

Petitions for reargument of the decision of the Supreme Court of Delaware were filed by Dann, Koenigsberg and the plaintiffs in Civil Action No. 1330, except Dann. They were denied December 4, 1964. The mandate of the Supreme Court of Delaware issued on December 7, 1964 and it was entered in the Court of Chancery December 8, 1964.

Thereafter on February 10, 1965, 84 days after the entry of the opinion of the Supreme Court of Delaware, Arthur Hoffman filed a petition for certiorari in No. 893. Briefs in opposition were filed by certain respondents within the 30 days prescribed by Rule 24(1) of this Court.

On March 4, 1965, 106 days after the entry of the opinion of the Supreme Court of Delaware, Ezzes filed a petition for certiorari in No. 954. Again, briefs in opposition were filed by certain respondents within 30 days after the receipt of Ezzes' petition. Ezzes filed a reply brief in support of his petition for certiorari on April 6, 1965.

Then came Dann, *in propria personam*, by letter to the Clerk of this Court dated April 7, 1965, requesting permission to argue against the decision below. Dann's brief was filed in this Court on April 13, 1965, 146 days after the entry of the opinion below and 126 days after the entry of the mandate of the Supreme Court of Delaware.

ARGUMENT

1. Dann's brief is entitled to no consideration by this Court and should be stricken from the files. The 90 day time limit for filing a petition or cross-petition for writ of certiorari to review a judgment below is jurisdictional 28 U. S. C. § 2101(c). Dann is not even entitled to submit a brief as respondent in opposition to either petition since by Rule 24(1) of this Court a brief in opposition must be filed within 30 days of the receipt of a petition for certiorari. The petition in No. 893 was filed on February 10, 1965. The petition in No. 954 was filed on March 4, 1965. April 3, 1964 was the last day for Dann to file a brief in opposition to the petition in No. 954.

Even if Dann's brief had been filed within 30 days from his receipt of either of the petitions, as a respondent he would not be permitted to argue against the decision below. A nongovernmental party in the position of a respondent who does not file a cross-petition for certiorari, may not argue in opposition to the decision below. *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435 (1924). Although *United States* v. *American Ry. Express Co.* spoke in terms of appeal and cross-appeal, the principle of law is the same for petition and cross-petition for certiorari. *Alaska Industrial Board* v. *Chugach Elec. Assoc., Inc.*, 356 U. S. 320, 325 (1958); *Lagnes v. Green*, 282 U.S. 531, 537-39 (1931); *Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91 (1928); *Federal Trade Commission* v. *Pacific States Paper Trade Assoc.*, 273 U. S. 52, 66 (1927).

In the absence of a cross-petition, a respondent cannot attack the decree below to enlarge his own rights or to lessen his adversary's. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191-92 (1937) *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434

(1940). See 7 MOORE'S FEDERAL PRACTICE, para. 72.05 (2d ed. 1955); 5 Am. Jur. 2d *Appeal and Error* § 707 (1962); Note, 51 HARV. L. REV. 1058 (1938) ("Since the February term of 1796 when a decision involving the problem was first reported, the [Supreme] Court, without a single dissent being voiced, has consistently adhered to the principle that the respondent may not, in the absence of a cross appeal, challenge the judgment of the lower court [footnotes omitted]").

2. Dann's attempt to seek review by this Court of the Delaware Supreme Court decision is also subject to other glaring jurisdictional defects. Dann has not complied with Rule 23(1)(f) of this Court specifying the stage of the proceedings in the court of first instance, at which, and the manner in which, the federal questions he seeks to review were raised. He cannot do so because no federal question was properly raised at the trial level.

On page 6 of his brief to this Court, Dann alludes to the "Appendix of Sol A. Dann filed in the Supreme Court of Delaware," which he fails to print in the Appendix submitted to this Court. Of the nine page references he cites from this unprinted material for the proposition that "These Federal questions were duly, timely and repeatedly raised before Chancellor Collins J. Seitz because the *stockholders' notice is contrary to SEC regulations*" (DB 6), seven make no reference whatsoever to any SEC regulations and the other two refer to portions of a private six page letter by Dann to his co-counsel dated January 24, 1964, written after the decision of the Court of Chancery approving the settlement. Moreover, copies of Dann's letter of January 24, 1964 to his co-counsel were never served on counsel of record for the other parties in the Court of Chancery. (Appendix of Sol A. Dann filed in Supreme Court of Delaware, A-6).

As for Dann's contention that he raised federal questions before the Supreme Court of Delaware, it is enough to say that Delaware procedure requires that a question be raised at the trial level before it will be reviewed by the Delaware Supreme Court. Rule 5(7) of the Supreme Court of Delaware. Consequently when a party tries to raise a federal question for the first time on appeal to the Delaware Supreme Court, that court will decline to consider the question. *Cottrell* v. *Pawcatuck Co.,* 36 Del. Ch. 169, 128 A. 2d 225, 233 (Sup. Ct. Del. 1956), *appeal dismissed,* 355 U. S. 12 (1957). This Court has recognized that a state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, is a valid exercise of state power. *Williams* v. *Georgia,* 349 U. S. 375, 382-83 (1955); *Bailey* v. *Anderson,* 326 U. S. 203, 206-07 (1945).

In addition, Dann was not properly before the Supreme Court of Delaware as an appellant since he had not filed a timely appeal from the decision of the Court of Chancery. Again the Delaware Supreme Court was within its rights in failing to pass on any question raised by Dann. In striking Dann's brief from the record, the Delaware Supreme Court did not pass on any of the merits of Dann's contentions, but held only that it should not do so because its appellate jurisdiction was not properly invoked in accordance with the laws of the state. A state has the power to prescribe the jurisdiction of its appellate courts, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of state law. *John* v. *Paullin,* 231 U. S. 583, 585 (1913). In striking Dann's brief, nothing was decided but the preliminary question of the court's jurisdiction to pass upon the matters raised in Dann's brief,

and that question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of state law. *Newman* v. *Gates,* 204 U. S. 89, 95 (1907).

Dann's continued lack of respect for simple and well known appellate procedures not only deprives this Court of jurisdiction to consider his legal arguments, but also reinforces the conclusion that his claims are entirely without substance.

3. Although Dann's position in this Court is far from clear, it appears that he is objecting to the lower courts' approval of the settlement either (1) because the court-approved notice to stockholders did not refer to Dann's "evidence" in support of the allegations of the complaint, (2) because Dann's "evidence" was such as to preclude the lower courts from approving the settlement or (3) because the settlement, in some unspecified manner, was not fairly arrived at.

The notice to stockholders submitted to the court for approval by Dann's own attorneys and vouched for by his attorneys and himself personally at the settlement hearings was the subject of careful consideration by the Court of Chancery which found it sufficient (DA 340, 365-66, 369-374, 412-413, 420-421). Because of Dann's repeated reiteration of his charges, he has been called upon over and over again to show something to support them and each time he has failed to do so, even admitting under oath he had no evidence other than that adduced at the hearings (DA 287-301, 318-320, 309-310, 329-331, 377-383, 397-398, 409, 412-413, 420-421). Instead, he attacked his own attorneys for conceding the lack of merit in his claims and eventually the courts below for agreeing that they were without merit. After the decision of the Court of Chancery, he again reiterated his charges.

The Court of Chancery carefully considered Dann's charges and "read carefully all the material which [Dann] sent me, including the communications with counsel. * * * [I]t is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted" (DA 457-458). In its opinion the Court of Chancery stated (RA 93):

> "Having considered the nature of the claims and possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs."

And the Supreme Court of Delaware characterized plaintiffs' claims as "devoid of merit" and said that "it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was a harassment of Chrysler, to approve a settlement" (DBA 71).

Dann's contention that the settlement was not fairly arrived at was also fully considered below. At a hearing on February 24, 1964, the Court of Chancery stated (RA 58-59):

> "As I understand it, in substance [Dann] has done no more than state what he stated on the witness stand at the hearing on the settlement, except now he accuses counsel somehow of a conspiracy.
>
> " . . . the Court was very conscious of the claim that somehow this was not a settlement fairly arrived at. . . .
>
> ". . . All I can say is that feeling as I do, a great responsibility to see that the settlement is only ap-

> approved if it is fair and in good faith, I have found nothing in the matters presented to me which would justify further hearings or modification of this settlement."

Thus, the points Dann is apparently attempting to raise in this Court were decided against him on adequate non-federal grounds below. In such a case this Court will decline to review. *Herb* v. *Pitcairn,* 324 U. S. 117, 125-26 (1945).

CONCLUSION

For the foregoing reasons and for the reasons set forth in our briefs in No. 893 and No. 954, it is respectfully submitted that the "Brief of Sol A. Dann, Plaintiff Below, in Support of Petitions for Certiorari" should be stricken from the files, and the petitions for writ of certiorari in No. 893 and No. 954, October Term, 196-, should be denied.

Respectfully submitted,

FRANCIS S. BENSEL
ROBERT EHRENBARD
350 Park Avenue
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APPENDIX

Rule 5(7) of the Supreme Court of Delaware:

Questions Which May be Raised on Appeal. On appeal, any question may be raised which has been fairly presented to the court below for decision, and it shall not be necessary again to raise any such question raised in the cause by way of motion for a new trial.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 893

ARTHUR HOFFMAN,
Petitioner,

against

CHRYSLER CORPORATION, *et al.*, and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

SOL A. DANN, *et al.*, and MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 954, Oct. Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN RESPONSE AND OBJECTION TO THE BRIEF OF SOL A. DANN

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Introductory Statement of Objection

A. The Dann Brief Should Be Stricken By The Court.

In knowledgeable disregard of the Court Rules, Sol A. Dann filed a brief with this Court on April 12, 1965, more than four months after the Supreme Court of Delaware

had denied his petition for reargument, on December 7, 1964 (S. Ct. Dkt. #23).* He did not make application to this Court for an extension of time to file. His filing is untimely on all counts.

The Hoffman petition (No. 893) was filed on February 9, 1965, so that all respondents' briefs thereto were required to be filed, under Rule 24(1), no later than March 11, 1965. The Ezzes petition (No. 954) was filed on March 4, 1965,** so that the last day to file a respondent's brief thereto was April 3, 1965.

Dann chose purposefully to await the filing of all other petitions and briefs before filing anything himself. He concedes this (Dann Brief, pp. 2-5).

Dann unsuccessfully attempted to use the same tactic before the Supreme Court of Delaware, flouting normal procedures and the established rules of that court. After waiting until the normal period for brief filing was about to expire, Dann *in pro per* requested the Supreme Court of Delaware, by letter dated August 21, 1964, to grant an extension of time to him to file a brief until September 30, 1964. Appellees' briefs were due to be filed on August 28, 1964. His asserted third and fourth reasons for the requested extension were that he wished to await the filing of all briefs by appellant objectors and appellee plaintiffs so that, as stated by him, he would know whether they would file briefs as he had requested, "consistent with and not contrary to those allegations" set forth in Dann's filed Appendix. The Gallo plaintiffs then vigorously opposed the extension sought by Dann. Their counsel, William

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* Reference will be made herein to the Appendix to Dann's brief as Dann A ; and to the Hoffman petition as Hof. A . All other references will be the same as in the Gallo brief previously filed in No. 893.

** The Ezzes' petition itself was untimely filed. In that respect see respondents' briefs in No. 954 in opposition to Ezzes petition (Gallo brief, pp. 10-11; Defendants' brief, pp. 13-16).

E. Taylor, Jr., Esq., advised the court of their position in terms that are markedly apposite here:

> "Reasons 3 and 4 apparently relate to matters that lie primarily between Mr. Dann and his former attorneys. As I view it, Mr. Dann has no right or privilege under any circumstances to require me to file briefs consistent or even not consistent with any views that he may maintain. I am not counsel to Mr. Dann and never have been.
>
> "I believe that the position Mr. Dann should like to take as reflected in his third and fourth reasons suffers from a certain arrogance, at least insofar as it relates to the Gallo appellees and to me. He has no right or privilege to sit over any brief that I may submit in behalf of my clients or to supplement it in any particular. If Mr. Dann has anything to say, he should say it within the due time that was alloted to him and he should say it directly and at once and not as a delayed barrage coming after the filing of appellees' briefs, or indeed, after all briefs.
>
> "The Gallo appellees were entirely independent of Mr. Dann in the Court below and they remain entirely independent of him on this appeal. They believe that his request for extensions should be denied; and they urge this strongly."

The Supreme Court denied Dann's request for an extension on August 25, 1964.

Dann follows the same approach before this Court. He states in his brief that he requested the objectors to appeal to this Court (Dann Brief, p. 19). He requests this Court to excuse his delay in filing because he "had hoped and relied upon 'objectors' to fully and accurately explain his position before the court" (Dann Brief, p. 2). This is a lame excuse indeed. If Dann were dissatisfied with the Hoffman brief, which was filed on February 9, 1965, why did he wait until April 12, 1965 to make his own filing? The same holds true with respect to the Ezzes' petition, filed on March 4, 1965. It is apparent that Dann is once

again attempting to sit over *all* briefs filed with the court —a combination of arrogance and flaunting disregard of the rules of this Court.

Furthermore, Dann is following the same tactical pattern with respect to the brief itself as he unsuccessfully pursued before the Delaware Supreme Court. Dann did not take an appeal to the Delaware Supreme Court from the judgment of the Chancellor approving the settlement. Nevertheless, he filed a brief on August 28, 1964, *in pro per*, with the Delaware Supreme Court which he entitled, "Brief of Plaintiff Sol A. Dann" (S. Ct. Dkt. #9). In the brief itself, Dann argued in opposition to the judgment below and sought a reversal and vacatur of the judgment and a remand. It was substantively an *appellant's* brief. A motion was made by defendants to strike Dann's brief on the ground that having failed to take an appeal Dann was precluded under Delaware law from asserting error in the rulings of the Chancellor and he could only file a brief as an appellee in support of the lower court's determinations. (S. Ct. Dkt. #13, 18.) In its final decision affirming the judgment of the lower court, the Delaware Supreme Court granted the motion and struck Dann's brief from the record. The court held that Dann had no standing to argue in opposition to the judgment below (Dann A. 75).

In essence, Dann's lack of status before the Delaware Supreme Court is the same lack of status that obtains for him in this Court. He is not a petitioner for a writ of certiorari. On the other hand, Dann does not regard himself as a respondent (Dann Brief, p. 3). He entitles his writing as, "Brief of Sol A. Dann, Plaintiff Below, In Support of Petitions for Certiorari." Moreover, he has assumed the privilege of recasting the case name by surrounding the term "Respondent" with quotation marks as he applies it to himself in this case. Not only has Dann denied his status as a respondent but his brief is not in any sense a respondent's brief. He does not support the

determinations of the courts below. He opposes them, albeit for his own reasons. These are surely not activities of a respondent; and they belie the status of respondent upon which Dann would technically rely for authority to file his brief to this Court. The status is not there for him to rely upon.

Dann seems to make his presentation in his brief as if it were a petition for certiorari, attempting to raise questions that are solely personal to him. Dann is not seeking to support Hoffman and Ezzes. Dann is seeking, by indirect and highly irregular means, to support Dann.

Dann is an attorney. He knows very well the consequences of not appealing or seeking certiorari. Yet he chose not to appeal to the Delaware Supreme Court or to file a petition to this Court. If rules of court are to have meaning and if all other litigants are to comply with the rules and are to be restricted thereby, there is no reason why Dann ought to have special status and be privileged, chameleon-like, to flip, as he may choose and enjoy, from respondent when that pleases him to appellant when that pleases him.

The Gallo respondents respectfully object to the Dann brief and submit that it should be stricken by the Court.

B. Dann Opposes the Decisions of the Delaware Courts for Personally Motivated Reasons.

Certain basic facts relating to Dann's posture in this litigation are significant. Dann's predominant concern is the matter of his own public image. He concedes this (A. 431-432). The thrust of Dann's entire post-decisional position was plainly stated by him during his oral presentation to the Chancellor when seeking, *inter alia*, a reopening of the record after the decision approving the settlement had been filed (A. 431-432):

> "Mr. Dann: May it please his Honor, the Court, I would like to state my position concerning any of

the proposed orders that have been submitted or may be submitted to you.

"Since the publication of the stockholders' notice, but more especially since this Court's opinion, both I and my family have been terribly hurt at the way these have been interpreted in the press and by the public generally. In fact, your opinion was misinterpreted to mean that there was no basis for bringing this action, when in fact your Honor's opinion did not say so. . . .

"I need this Court's help in order to answer these vicious attacks against me and to make sure that I will have the opportunity to present my position and present to your Honor all of the facts concerning this case before any order is approved."

However, Dann has consistently considered that the objectives of the litigation have been obtained. Dann's law firm is a signatory to the Stipulation of Settlement in behalf of Dann, as plaintiff (A 40). In Dann's affidavit, in support of his firm's fee application, he states:

"65. The Stipulation of Settlement in this case specifically provided, on the top of page 4, the primary consideration for the settlement, namely:

'Plaintiffs having considered, among other things, the significant and steady progress in all phases of Chrysler's operations under new management, believe settlement of the litigation on the terms herein agreed, with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan, can fairly be considered an achievement of the objectives of the litigation and is much to be preferred to a continuation of the litigation, and is in the best interests of Chrysler and its stockholders.'"

Moreover, Dann's own law firm, Dann, Rosenbaum, Bloom & Kaufman, together with his former other coun-

sel, have applied to the Chancery Court for a fee of $5,000,000 (Dann Dkt. #164-169). Dann himself submitted an affidavit in support of that fee application (Dann Dkt. #169). Dann's law partner, Frank Rosenbaum, Esq., submitted an affidavit also. In his brief to this Court, at page 12, under the heading, "Gallos Institute Suit and Intervene. Double Trouble Begins", Dann refers to the $5,000,000 fee application filed by "counsel". The juxtaposition of the reference may prove to be misleading. The Gallo's counsel are *not* involved in the $5,000,000 fee application. The "counsel" involved are Dann's own law firm and his former-other counsel.

No fees have as yet been awarded. The Court of Chancery has deferred any consideration of fees until final approval of the settlement.

In his brief to this Court, at pages 19 and 21, Dann concedes that Chrysler has benefited from the change in the Incentive Compensation Plan, and that his asserted objective of a change of management has also been accomplished.

It is obvious that Dann does not find fault with the ultimate settlement outcome of the litigation or the determinations as such approving the settlement. Dann just does not like the language employed in the decisions of the Delaware courts, or rather, the reportage of the decisions. Consequently, he opposes the determinations and seeks vacatur for his private reasons, personal to him, or as he virtually puts it, his own public image. He is fence-straddling. His position is self-contradictory and self-defeating, and should not be countenanced by this Court.

Moreover, it is unfortunate that Dann has seen fit in his brief to cast aspersions upon the Gallo plaintiffs and their counsel. Such remarks are totally out of order. On this score alone, the Dann brief should be disregarded and

stricken under Rule 40(5). The Gallos are substantial stockholders of Chrysler. They own over 4,800 shares, which represents a current investment of more than $270,000. On the other hand, apparently, Dann's investment in Chrysler stock has been much reduced. The Gallos and their counsel have always acted separately and independently of Dann and his counsel. The Gallo action was instituted, prosecuted and settled in the utmost good faith and in the best interests of Chrysler and its stockholders.

Opinions Below

Dann makes no reference to the principal decisions of the Chancellor approving the settlement and denying applications for reargument, which are reported as *Dann* v. *Chrysler Corporation* in 198 A. 2d 185 (1963) and are reprinted in the Appendix to the Gallo brief in opposition to the Hoffman petition (Gallo A 1-41). He refers only to one of the numerous Memorandum or Letter Opinions rendered by the Chancellor during the course of the Chrysler litigation and the settlement proceedings. He calls it "the (forgotten) 'unrecorded' Opinion".* That Memorandum Opinion (Dann A 48-51) has not been forgotten; but it does not have any particular pertinency here. It relates solely to the defendant Newberg. The Chancellor

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* During the period from December 31, 1963, the date on which the principal opinion approving the settlement was filed, until March 9, 1964, the date of filing the final decree and judgment, the Chancellor rendered five opinions, of which one is reported (namely, the supplemental opinion denying the applications for reargument—198 A. 2d 185). The other four, consisting of two Memorandum Opinions (Gallo Dkt. #95, 104) and two Letter Opinions (Gallo Dkt. #88, 103) are unreported. During the course of the entire Chrysler litigation, the Chancellor rendered thirteen written opinions, of which only four are reported (166 A. 2d 431; 174 A. 2d 696; 198 A. 2d 185). Obviously, as with lower court opinions generally, only those opinions deemed to have more than limited significance are reported.

in accordance with the Stipulation of Settlement declined to dismiss the complaint with prejudice as to Newberg and also signified that the approval of the settlement would not affect the claims involved in the litigation between Chrysler and Newberg.

Jurisdiction

In what context Dann invokes the jurisdiction of this Court is not clear. However, in whatever capacity he may have sought to file his brief, the Gallo respondents submit that this Court does not have jurisdiction to entertain it. The Dann brief is untimely filed, as already shown. 28 U. S. C. § 2101(c); Rule 24(1); *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548 (1945).

Furthermore, Dann raised no *constitutional* question before the Court of Chancery. Dann concedes this in his brief (pp. 4-6). Delaware procedure prescribes that no question may be raised on appeal to the Delaware Supreme Court unless it has been fairly presented to the court below for decision. Rule 5(7), Rules of the Supreme Court of Delaware (Vol. 13, Del. Code Ann., Court Rules, 1964 Supp., pp. 5-6). This rule has long been the procedural requirements in Delaware. *Cottrell* v. *Pawcatuck Company*, 36 Del. Ch. 169, 128 A. 2d 225, 233 (S. Ct., Del. 1956), cert. den. 355 U. S. 12 (1957). (See other Delaware cases cited at page 12 of the Gallo brief, in opposition to the Ezzes petition). Having failed to raise a constitutional question before the Chancery Court, and none having been decided by the Delaware Supreme Court, Dann may not raise such question here. *John* v. *Paullin*, 231 U. S. 583, 585 (1913); *Bailey* v. *Anderson*, 326 U. S. 203 (1945).

Nor did Dann properly raise any *federal* question before the Court of Chancery. Dann contends here that the SEC proxy rules were violated under the Securities Exchange

Act of 1934, in that, as he asserts, the Notice to Stockholders was misleading in stating that there was no evidence to support certain claims alleged in the complaint. Aside from the fact that there is no merit to his contention, Dann did not raise the federal statute or the SEC rules during the course of the settlement proceedings; or prior to the final decision of the Chancellor approving the settlement; or in his application to reopen the record, heard by the Chancellor on February 7, 1964. Nor did he specifically make mention of any such claimed violation in his letters of February 14, 1964 or February 18, 1964 addressed to the Chancellor seeking reconsideration of the denial of his application (Dann A 32-37). Only short references to violation of the SEC rules were made by Dann in one or two letters to his counsel, which formed part of some forty-three papers that Dann mailed to the Chancellor with his accompanying letter of February 14, 1964. Hidden references to a federal statute does not specially set up or create a federal question, particularly when first mentioned in any respect after final decision has been rendered and an application for reargument has been denied. *Cuyley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

Moreover, even if Dann had properly raised a federal question before the Court of Chancery, he did not appeal to the Delaware Supreme Court. This Court has firmly established the jurisdictional principle that raising a federal question before the trial court will not be enough, if it is not pursued to the higher state court in accordance with state practice. *John* v. *Paullin*, *supra*.

State practice was applied to Dann. By failing to appeal to the Supreme Court of Delaware, that court determined on motion that he had no standing to argue in opposition to the judgment below and struck his briefs

(Dann A 75). Consequently, Dann had no appellant capacity before the Supreme Court of Delaware to raise any substantive constitutional or federal question in opposition to the judgment below, and he therefore cannot raise such questions here.

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise: and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John* v. *Paullin*, *supra*, 231 U. S., p. 583.

Dann's petition for reargument to the Delaware Supreme Court was denied (Dann A 76).

Dann did not file a petition for a writ of certiorari to this Court.

Consequently, Dann raised no constitutional or federal question in the Delaware courts within the requirements of this Court. He, therefore, lends no jurisdictional support to the Hoffman or Ezzes petitions on any basis, even if there be any such right of tangential support. Furthermore, it should be noted that Dann's proposed federal question is *not* the same as that which Ezzes seeks to raise for the first time in the Ezzes petition. Ezzes claims that 1963 prospective earnings or opinions as to such should have been included in the proxy material respecting the vote of Chrysler stockholders on the modification of the Incentive Compensation Plan. This is not Dann's contention. As to Hoffman, that petitioner belatedly wants to embark on a discovery of his own, acknowledging that he does not know the facts in the case although as an objector he had every opportunity to become fully informed

prior to and at the settlement hearings but neglected to do so or to participate. Dann has his personal axe to grind. It is certainly not that of Ezzes or Hoffman.

Questions Presented

The Gallo respondents will presently demonstrate:

1. That Dann was afforded every opportunity to present to the court prior to and at the settlement hearings, anything which he may have considered material for the court's determination of the fairness of the proposed settlement.

2. That the Chancellor's determination approving the settlement is amply supported by the extensive record, after hearings on proper notice to all Chrysler stockholders.

Counter-Statement of the Facts

The Court is respectfully referred to pages 4-14 of the Gallo brief filed in opposition to the Hoffman petition (No. 893) for an accurate summary of the proceedings in this litigation. It is also referred to the additional pertinent facts relating to Dann which are discussed in the Introductory Statement of Objection in this brief.

ARGUMENT

I.

The Court of Chancery was fully apprised of the papers in Dann's files.

A. Dann and His Counsel Had Produced On Pre-Trial Discovery All Material Then Considered By Them To Be Relevant to the Issues Involved in the Complaint.

Dann's papers were the subject of pre-trial discovery by the defendants prior to the settlement negotiations phase of the litigation. Under court order, subject to safeguards for privileged documents and the names of alleged informants, Dann produced, as he averred, "all material relevant to the issues involved in the complaint, as amended, in this suit, received by him prior to January 1, 1961" (A 330). One of his own attorneys made a special trip to Detroit to inspect the documents in Dann's files for three days and "separated out what I considered partinent to the complaint as then amended" (A 329, 309-10). Those documents were thereafter filed with the Court of Chancery and formed part of the record of the settlement, open to all stockholders of Chrysler for their inspection (A 388; Dann Dkt. #162A).

B. All of Dann's Documents Were Inspected At The Time of the Settlement Hearings, Upon Direction of the Court.

After the Notice of Settlement had been transmitted to the Chrysler stockholders, Dann once again adverted to the information in his files, both in his letter to the Board of Directors of Chrysler (Dann A 29-31)* and in his fee application (Dann Dkt. #167-169).

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* Parenthetically, the letter to the Board of Directors of Chrysler does not make any reference to the SEC proxy rules or to any violation thereof (Dann A. 29-31). His statement at page 14 of his brief that it does is not correct.

A pre-trial hearing was held before the Chancellor on April 11, 1963, at which the matter of the Dann documents were further considered (A 356-374).

The Gallo plaintiffs thereafter took immediate steps to determine whether Dann in fact had any evidence in his files. They believed that the heart of Dann's documents had been produced by him on the pre-trial discovery. Those documents had been considered in connection with the settlement negotiations. The Gallos thereupon moved for the production of all of the documents in Dann's files to which he adverted and they also noticed his deposition (A 377-379).

It is highly significant that Dann interposed objection to any further production and to the taking of his deposition. He directed his Delaware counsel to seek a protective order, and his objections and motion for protective order "were dictated over the phone and directed by Frank Rosenbaum and Sol A. Dann to be filed" (A 381-383). Some of the grounds raised in objection are illuminating:

> "b. There is no good cause shown for the taking of such depositions or for the necessity to produce or examine any additional documents.
>
> * * *
>
> "j. The said moving parties have failed to designate any specific document whatsoever and have failed to indicate the relevance of such documents as are in the possession of defendant Dann.
>
> * * *
>
> "m. That the investigation sought is destructive of the purpose of the settlement to which the relators were a party."

It is apparent that the position taken by Dann in seeking to defeat the motion is antithetical to his instant contentions and manifests their lack of substance.

The Chancellor, however, granted the motion. He directed that Dann produce the documents for inspection and that he appear to testify at the settlement hearing on May 13, 1963 (A 393-396).

All of the Dann documents were produced at the settlement hearing for inspection. At this juncture, it should be recognized that then and there Dann was in a position to select and present to the Chancellor the particular documents, if any, not theretofore produced, which he may have considered were material to the Court's determination of the fairness of the settlement. This, he declined to do (A 403-405). For Dann subsequently to have sought to vacate the Chancellor's determination so that he might have a hearing on his so-called information, and to object to the Court's denial of his application constitutes an affront to the court and a violation of the precepts of orderly judicial procedures. *Braun* v. *Fleming-Hall Tobacco Co.*, 33 Del. Ch. 264, 92 A. 2d 302 (S. Ct., Del., 1952).

Nevertheless, full right and opportunity were afforded to all parties and all objectors and their attorneys to inspect the Dann papers (A 402-408). They were inspected by attorneys for the Gallo plaintiffs through two full day and two night sessions, and on a third day through the late afternoon (A 408). In addition, attorneys for Ezzes, for Chrysler and for certain of the other defendants also inspected the Dann documents during that period (A 453-457).

The attorneys for the Gallos presented an oral report to the Chancellor during the settlement hearings regarding their inspection, concluding that the Dann documents were of the same kind and nature as the material theretofore filed by Dann and did not comprise evidence (A 408-409). Dann did not object to the report or the conclusions reached.

Dann also testified at the settlement hearing. He was in a position to testify in any manner and to refer to any of his documents. He was cross-examined by the attorney for objector Koenigsberg (A 410-421). Dann notes in his

brief at pages 13-14 that he testified with respect to a Dun & Bradstreet report relating to W. Alton Jones. Obviously, a Dun & Bradstreet report has no probative value. Furthermore, the W. Alton Jones transactions were thoroughly explored on depositions and at the settlement hearings. None of the objectors considered that the Jones charges had any merit. Dann testified in support of the proposed settlement and conceded that his documents did not contain admissible evidence (A 410-421).

After testifying at the settlement hearing, Dann asked to be "excused permanently" and for leave to take to Detroit the documents which he had produced. The request was granted by the court (A 421).

Dann, significantly, did not repudiate his testimony at the hearing before the Chancellor on his application to reopen the record after final decision (A 438).

Dann may not for his personal reasons seek to vacate the determination of the Delaware courts. He had every opportunity to urge any contention at the settlement hearings and to introduce any documents that he deemed material. If Dann now feels that he did not take full advantage of that opportunity, that was a matter of his own choice and making and he may not now claim that he was deprived of any constitutional right thereby. *Southern Ry. Co.* v. *Durham*, 266 U. S. 178 (1924).

II.

The determinations of the Delaware Courts approving the settlement are amply supported by the Record after hearings held in accordance with proper judicial procedures.

The Notice of Settlement complied with all the requirements of Delaware law. *Braun* v. *Fleming-Hall Tobacco Co.*, *supra*, 92 A. 2d 302, 309; *Perrine* v. *Pennroad Corp.*, 28 Del. Ch. 342, 43 A. 2d 721, 725 (Ch. Ct. 1945). The

Chancellor found the court-approved notice to be sufficient (A 374).

The notice is elaborately detailed (DX 300). It fully informed the stockholders of the terms of settlement; the attorneys' views of the claims involved; and the right of any stockholder of Chrysler to attend the settlement hearings and present any evidence that may be relevant to the issues to be heard. The stockholders were also advised that all papers and exhibits in the settlement and other documents in the action were on file and available for inspection by the stockholders prior to the settlement hearings. These papers included Dann's documents produced by him on pretrial discovery (Dann Dkt. #162A).

The Chancellor accorded to the objectors a wide latitude of discovery and also appointed an *amicus* to render a report. The hearings on the settlement were extensive (T. Vols. I-III).

All of the foregoing procedures complied with the requirements of due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1877).

The Chancellor found that the evaluations of the claims made by the plaintiffs' attorneys in the Notice were fully supported by the extensive record (Gallo A 13-23); that the settlement was fair and reasonable (Gallo A 33); and that the settlement was entered into in good faith (A 446-447). The court's findings were made under Delaware law and standards. *Krinsky* v. *Helfand*, 156 A. 2d 90, 94 (S. Ct., Del., 1959); *In re Ortiz' Estate*, 26 Del. Ch. 240, 27 A. 2d 368, 374) (Ch. Ct., 1942). These determinations were affirmed by the Delaware Supreme Court applying Delaware law and standards of review. *Rome* v. *Archer*, 197 A. 2d 49 (S. Ct., Del., 1964). The determinations were not made on any federal ground. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157 (1917).

Dann's contentions are devoid of merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the brief of Sol A. Dann should be disregarded and stricken, and given no consideration by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

— No. 893

ARTHUR HOFFMAN,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.
"Respondents", and Plaintiffs below,

and

CHRYSLER CORPORATION, et al., and
PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 945, October Term 1964),
Objector below.

BRIEF OF RESPONDENTS JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION TO BRIEF OF SOL A. DANN IN SUPPORT OF PETITIONS FOR CERTIORARI

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Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 954, October Term 1964), Objector below.

BRIEF OF RESPONDENTS JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION TO BRIEF OF SOL A. DANN IN SUPPORT OF PETITIONS FOR CERTIORARI

Foreword

Sol A. Dann, a member of the Michigan bar and one of the original plaintiffs in the stockholders' derivative suit, settlement of which is sought to be reviewed herein, has filed a brief in support of the petitions for certiorari filed by stockholder petitioners Hoffman in No. 893, and Ezzes in No. 954. Unlike these petitioners Dann did not appeal from the decision of the Court of Chancery approving the settlement which he now attacks; and for this reason the Delaware Supreme Court held, following the established state practice, that he was not an appellant and

> "has no standing to argue in opposition to the judgment below (citing cases). The brief of the appellee Sol A. Dann is accordingly ordered struck from the record."
>
> (Appendix to Dann Brief, p. 75)

Dann does not seek in this Court to review, on federal grounds or otherwise, the decision of the Delaware Supreme Court denying him the status of an appellant. Instead, he takes advantage of his status as appellee in the state court, and respondent herein, to spread upon the records of this Court his former attacks upon the Courts below and all the attorneys who have met with his displeasure including his own law partner.

Dann agreed to the settlement of this case in the Delaware Court of Chancery. In his affidavit sworn to March 27, 1963, filed with the Court of Chancery, he stated as follows:

"62. Deponent's primary purpose, prior and subsequent to litigation has always been the protection of Chrysler and its stockholders. Deponent believes that the over-all benefits to Chrysler and its stockholders, resulting from the immediate termination of all litigation far outweighs any amounts, even though it be in untold millions, that could be recovered from the individual defendants. This is particularly true in deponent's opinion considering the change in management and the company's improved practices that have already doubled the value of Chrysler's stock in a healthy corporation with good future potentials, as compared to pre-existing conditions."

Therein he referred approvingly to the stipulation of settlement:

"65. The stipulation of settlement in this case specifically provided, on the top of page 4, the primary consideration for the settlement, namely: 'plaintiffs having considered, among other things, the significant and steady progress in all phases of Chrysler's operations under new management, believe settlement of the litigation on the terms herein agreed, with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan, can fairly be considered an achievement of the objectives of the litigation and is much to be preferred to a continuation of the litigation, and is in the best interests of Chrysler and its stockholders.'"

That language, written several weeks after the notice to the stockholders establishes that Dann unequivocally approved the settlement.

I.

The genesis of Dann's attacks is clear. He became incensed by certain unfavorable comments in the Chancellor's opinion approving the settlement, including, among other things, a reference to Dann's securing for himself a private benefit in the settlement (Appendix to Brief of Certain Defendants in No. 893, pp. 99-102). Cf. *Young* v. *Higbee Company,* 324 U.S. 204, 213. Accordingly, he sought to set aside the approval of the settlement and to reopen the record.

The Chancellor denied the application. Mr. Dann did not thereafter appeal from the decree approving the settlement or from the separate order of the Chancellor refusing to reopen the record (Appendix to Dann Br. pp. 44-45). Instead, he appeared in the Delaware Supreme Court as appellee and attempted to attack the settlement. That Court held that since he was an appellee and not an appellant he had no standing to attack the decision of the lower court. (Supra, p. 2). Likewise, he did not file a petition for certiorari but as respondent filed a late brief in support of the Hoffman and Ezzes petitions herein. His charges are not supported by any evidence in the record.

II.

The Court of Chancery and the Supreme Court have approved the settlement—but on grounds different from those desired by Dann.

Since those courts arrived at the very result Dann wished, how could there have been any violation of his rights even though the grounds of the decision were not pleasing to him?

For the sake of brevity, we refer here to only two of the many misstatements in the Dann brief. (1) At page 10 of his brief, he states that his counsel, "stipulated with the defendants without his knowledge or consent, not to take the depositions of any defendants until Dann's deposition was completed." By order dated February 23, 1961, over the objection of plaintiff's counsel, the Court of Chancery stayed all discovery; thereafter the Court, on its own motion, by orders dated May 16, 1961 and October 27, 1961, stayed all depositions. The plaintiffs had moved to take the depositions of certain defendants on February 21, 1961 but this was denied by the Court. (2) Dann's crude comment at page 18 of his brief concerning the reaction of plaintiff's counsel to the lower court's opinion is without foundation. The petition for reargument was filed not in the Court of Chancery, but in the Delaware Supreme Court, and on the insistence of Dann's law firm.

Questions Presented

The first question—"Did the stockholders' notice contain false and misleading statements, contrary to the S.E.C. regulations?"—raises only a question of fact. Both the Chancery Court and the Supreme Court of Delaware have decided there was no fraud in the proxy statement (Brief of Respondents Horvath et al. in reply to Ezzes Petition # 954, pp. 4, 5). This Court will not review a factual decision concurred in by the two courts below and uncontroverted by any evidence. No question of law, much less federal law, is presented.

The second question—"Were the stockholders deprived of equal protection, a fair and impartial hearing, and of their rights, liberties and property without due process of law?"—is not presented by the record. Dann's self-serving statements are not evidence.

The third question—"Is the Opinion of the Delaware Supreme Court erroneous and the product of a 'whitewash' settlement".—is likewise presented only by Dann's self-serving statements below.

Conclusion

For the reasons above set forth the petitions should be denied.

Respectfully submitted,

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